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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNION GAP IRRIGATION DISTRICT;
YAKIMA-TIETON IRRIGATION DISTRICT;
YAKIMA VALLEY CANAL COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. In 1945 the United States District Court for the Eastern District of Washington entered a consent judgment (herein sometimes referred to as the "1945 Judgment") in an action (herein sometimes referred to as "Civil 21") in which the users and holders of rights to approximately eighty percent of the waters of the Yakima River basin were joined. The court retained jurisdiction over matters of interpretation and relating to the administration of the judgment. In 1979 the District Court remanded an action for general adjudication of all surface water rights in the Yakima River basin to the appropriate Washington state court of general jurisdiction. Did the remand of the action for general adjudication to the state court, the McCarran Amendment (43 U.S.C; Section 666), and the principles of wise judicial administration require that the District Court in Civil 21, thereafter, in the exercise of its informed discretion, decline to establish and adjudicate for the first time, beyond what it held to be the scope of the 1945 Judgment, the existence for the preservation of fish life of a potentially overriding, treaty reserved right to the surface waters of that same Yakima River basin?

2. When the United States, as plaintiff, started Civil 21, it joined as parties to the action the users of approximately eighty percent of the waters of the Yakima basin. In its complaint it sought to obtain a declaration of its duties as "distributor" of water, and to establish, among other things, the interrelated and interdependent rights of the plaintiffs as against the defendants and of the defendants among themselves to the use of waters from a common source, the Yakima River.

Counterclaims by defendants sought a general adjudication. The 1945 Judgment was presented by the United States and consented to by all parties to settle all issues in the case. It declared the duties of the United States to distribute water from the river to all the parties, to others and (in fulfillment of a Congressionally modified Yakima Indian treaty reserved right to water from the Yakima River) to the Yakima Indian Reservation for distribution by an agency of the United States government, namely the Wapato Indian Irrigation Project, an arm of the predecessor of the Bureau of Indian Affairs. Is the United States, because of these proceedings, precluded from asserting, thirty-five years later and contrary to the judgment, a claim to a Yakima Indian treaty reserved water right with priority overriding rights recognized in the consent judgment?

3. Is the 1945 Judgment to be given a res judicata effect as between the parties to Civil 21, including the United States, even though Civil 21 was not a general adjudication of all surface water rights in the Yakima River basin?

4. Where the United States, in its trust and supervisory capacity for the Yakima Indians, participated in Civil 21 and presented the 1945 Judgment for entry by the District Court, does the judgment which was expressly made without prejudice to claimants to water who were not parties, preclude the U.S. from asserting, thirty-five years later and on behalf of those same Indians, a treaty reserved water right with a priority ahead of virtually all, if not all, rights recognized in the earlier judgment?

5. Is the Yakima Indian Nation, whose rights the United States represented in Civil 21, likewise bound although it was

not joined and did not directly participate in the proceedings leading up to entry of the 1945 Judgment?

PARTIES TO THE ACTION

This action involves the petitioners Union Gap Irrigation District, Yakima-Tieton Irrigation District, Yakima Valley Canal Company, as well as the Sunnyside Valley Irrigation District, Roza Irrigation District, the State of Washington and the United States of America. It also involves several irrigation districts and others who are not parties to this appeal, namely Kittitas Reclamation District, Selah & Moxee Irrigation District, Sunnyside Valley Irrigation District, Roza Irrigation District, Grandview Irrigation District, Grandview Irrigation District, Granger Irrigation District, Prosser Irrigation District, Snipes Mountain Irrigation District, Benton Irrigation District, Zillah Irrigation District, Broadway Irrigation Co., Moxee Ditch Co., Sub-A, Naches-Selah Irrigation District, Terrace Heights Irrigation District, Westside Irrigation Co., Outlook Irrigation District, Cascade Irrigation District, Confederated Bands & Tribes of the Yakima Indian Nation. In fact, the several irrigation districts and canal companies in turn represent hundreds if not thousands of water users in the Yakima basin who have not been individually joined either before the District Court or the Court of Appeals.

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OPINIONS BELOW

The amended opinion by the United States Court of Appeals for the Ninth Circuit was filed June 14, 1985, and is reported at 763 F.2d 1032. Earlier (unpublished) opinions were filed on September 10, 1982, and February 6, 1985. Appendix p. 16, and p. 36. Both opinions have been replaced. The decision of the District Court is embodied in its unreported Instructions to the Watermaster dated October 31, 1980, and Supplemental Instructions to the Watermaster dated November 28, 1980. The Instructions to the Watermaster by the District Court were not published and are reproduced in the Appendix, pp. 54, 61.

JURISDICTION

The Amended decision of the United States Court of Appeals for the Ninth Circuit was entered June 14, 1985. A petition for certiorari is therefore due September 12, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rule 17.1 of this Court.

STATUTES AND TREATIES INVOLVED

1. The Act of August 1, 1914 (38 Stat. 582, 604 herein the "1914 Act") is reproduced in the Appendix (App. 70).

2. 43 U.S.C. § 666(a) (66 Stat. 560) is reproduced in the Appendix. (App. p. 74).

3. The Act of July 1, 1940 (54 Stat. 707. herein the "1940 Act") is reproduced in the Appendix. (App. 75).

4. The Treaty with the Yakimas is reproduced in the Appendix. (App. 76).

STATEMENT OF THE CASE

BACKGROUND.

The Union Gap Irrigation District, Yakima-Tieton Irrigation District and Yakima Valley Canal Company divert surface waters for irrigation in the Yakima River basin in the State of Washington. They hold water rights typical of those held in the basin. Those rights have been governed for over 40 years by a consent judgment entered in this case by the United States District Court for the Eastern District of Washington on January 31, 1945 (herein the "1945 Judgment").

The Yakima River basin contains approximately 6,000 square miles (an area larger than the State of Connecticut) and almost all of Kittitas and Yakima Counties and one-half of Benton County.[1] See Map reproduced opposite footnote p. 30. The basin extends 175 miles from the crest of the Cascade Mountain range to the confluence of the Yakima and Columbia Rivers near Kennewick, Washington.[2]

The basin is in the rain shadow of the Cascade Mountains.[3] Average rainfall is about 7". The months of July and August are particularly dry, receive less than 5% of the total annual precipitation and commonly include periods of four to six weeks without any rain.[4] Most of the annual precipitation occurs in the winter.[5] Seventy-five percent comes in the months of October through March.[6]

The average annual runnoff is approximately 2.6 million acre feet. It usually drops to its lowest point in August.[7] Ninety-two percent comes from the Cascade Mountains.[8]

Irrigation in the Yakima Basin began before the turn of the century. By 1905, the natural flow of the Yakima River was fully

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* *Footnotes are on pages 28-30 hereto.*

appropriated and used. Some 125,000 acres were irrigated (about 25% of present development).[9]

Without storage reservoirs the flows in the Yakima River basin could not meet late summer irrigation demands.[10] Investigations to develop water storage and distribution facilities were begun about 1903 by the United States Reclamation Service.[11] Pursuant to legislation specifically adopted for that purpose, § 90.40.030 RCW (Laws 1905 ch 88 § 3), the United States, acting pursuant to the Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* (32 Stat. 388), filed a withdrawal of all the unappropriated waters of the Yakima River and its tributaries, holding them for irrigation.[12] Six dams and reservoirs in the Cascade Mountains to store 1,070,000 acre feet of water were begun in 1909 and completed in 1933.[13] They store water in the winter and spring for release during the summer.[14]

The surface waters of the Yakima basin are fully appropriated. No further natural flows or storage waters are available without additional storage.[15]

The largest single district in the project is the 140,000 acre Wapato Irrigation Project operated by the Bureau of Indian Affairs.[16] The area irrigated within the Yakima Indian Reservation is greater than the entire area irrigated in the Yakima basin prior to the construction of the Yakima Project.[17] Approximately 55% of this irrigated reservation land is held in trust by the United States.[18]

The Yakima basin contains about one-third of the irrigated land in the State of Washington, about 500,000 acres.[19] Over 400,000 acres are served by the Yakima Project.[20] By 1981, the Yakima Project contained over 12,000 farms, a farm popula-

tion of over 38,000 people, and a total population of approximately 175,000 people.[21] The entire population is largely dependent upon the agricultural economy of the area.

Sixty kinds of fruit, vegetables, seed, grain, forage and specialty crops are produced in Yakima County alone.[22] Of the 3,072 counties in the United States, Yakima county ranks first in the production of apples, mint and hops and fifth in overall agricultural production.[23] The gross value of crops produced in the Yakima Project in 1981 was approximately 370 million dollars.[24]

THE 1906 LIMITATION ON INDIAN DIVERSIONS

In 1905, when investigation of the Yakima Project under the Reclamation Act of June 17, 1902, 43 U.S.C. § 372 *et seq*, 32 Stat. 388, began, it was planned to store and release the largest possible portion of the waters of the basin contemplating the fullest possible development in the future. The lands of the Yakima Indian Reservation were included in the plan. The Yakima River was overappropriated and the conflict between the United States in its capacity as trustee for the Yakima Indians and non-Indian water users over rights to use of water in the Yakima basin had already reached the courts.[25] For the plan to succeed all inconsistent claims had to be eliminated. Accordingly, approval of the project depended upon satisfaction of certain conditions, affecting the Yakima River or any other body of water necessary for irrigation of lands within the project.

Conflicting claims to water for irrigation, power or any other purpose were to be adjusted. Suits to prevent diversions to the Indian reservation were to be terminated. Any and all

"difficulties, conflicts, litigation, complications or controversies" tending to restrict or embarrass appropriations of water for the project were to be settled, terminated and disposed of. The project was to be clean, feasible and free of difficulties or complications before any money was spent.[26] [27]

To satisfy these conditions, three major steps were taken. Flows of 650 and 147 cubic feet per second, respectively, were allotted by the United States to the Sunnyside Canal and to the reservation. These quantities were much less than was claimed and operated most effectively toward obtaining the consent of the other non-Indian water users to limit their claims proportionately. Those claiming 94.5% of all waters claimed by the non-Indian irrigation canals agreed to limit their diversions to actual diversions made during August 1905. The canals which failed to sign limiting agreements were relatively unimportant.[28]

On March 28, 1906, it was determined that the conditions had been satisfied and commencement of the project was authorized.[29]

THE 1914 ACT

The 147 c.f.s. flow allocation to the Yakima Indian Reservation created much controversy and dissatisfaction,[30] and conflict in Congress from approximately 1909 to 1914.[31] Congress directed the Secretary of the Interior to investigate the situation and devise a plan to provide water for the reservation. Indian Appropriation Act of August 24, 1912. The Yakima Tribe sent a Memorial to Congress contending that it owned one-half of the Yakima River and all of the water on the reservation, threatened to bring suit in federal court to settle

their water rights, and cited the decisions in the cases of *Winters v. U.S.*, 207 U.S. 564 (1908) and *Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir., 1908).[32]

In 1913 Congress created a joint commission to investigate the need and feasibility of getting storage waters "for the reclamation of the lands on said reservation, and for the use and benefit of the Indians of said reservation."[33] [34]

The joint commission conducted hearings and reported at length to Congress.[35] It was trying to settle the whole dispute as to water rights in the Yakima basin,[36] [37] and to get water for the Indians and the reservation.[38] [39] [40]

Congress was well aware of the existence of the doctrine of *Winters v. U.S.*, 207 U.S. 564 (1908).[41] It was discussed repeatedly in testimony before the joint commission,[42] and frequently and extensively in the debates on the appropriation bill.[43] It was told that the reservation was established to settle the Indians as an agricultural people.

By 1914 all of the irrigable lands of the Yakima Reservation had been allotted.[44] It was contended that the Indians' needs could be met with twenty acres of irrigated land per person. The joint commission, however, settled on irrigation of forty acres on each allotment.[45] Congress agreed. 38 Stat. 604. It enacted § 22 of the Act of August 1, 1914, 38 Stat. 604, which in part provided water from storage and limited the rights of the Indians to water from the Yakima River:

> [T]he Secretary of the Interior is hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred fourty-seven cubic feet per second heretofore allotted to said Indians, so that there

> shall be, during the low water irrigation season, at least seven hundred twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of the Yakima River and adequate for the irrigation of forty acres on each Indian allotment; . . .

THE 1940 ACT

The water rights guaranteed to the reservation by the Act of August 1, 1914, were later supplemented by an additional 100,000 acre feet per year. Act of July 1, 1940, 54 Stat. 707. This additional water was to be provided in accordance with the purpose of the August 1, 1914 Act.[46] Because the flow of water in the Yakima basin had been brought under control by storage for the Yakima Project, additional water which could have been diverted for the reservation was no longer available. The 720 second feet of flow had become the maximum as well and the minimum available. Congress authorized the additional 100,000 acre feet for the forty acre allotments provided for by the 1914 Act.[47] In the course of debate on the 1940 Act Representative Schafer of Wisconsin explained:

> [W]e found that these Indians had a valid interest and title to water rights in the Indian Reservation. Under a reclamation project the Government of the United States promised these Indians under a solemn, binding treaty, and under an act of Congress enacted August 1, 1914, that it would furnish sufficient water to them in payment of those water rights to adequately irrigate all forty acre allotments on the Indian Reservation. It has been found that the Indians have not received sufficent water to do that and this bill provides sufficient water . . . The bill merely executes the contractual obligations of Uncle Sam with his Indian wards. These Indians need that water and

> they are entitled to it under the law. I hope the gentlemen will not oppose this . . . so that Uncle Sam can keep faith with his Indian wards under his treaty obligations and the provisions of existing law.

Cong. Rec. 8414 (June 17, 1940).

UNITED STATES' CONTRACTS TO DELIVER 'SURPLUS' BASIN WATERS

In 1911 Congress enacted the Warren Act which authorized the Secretary of the Interior to enter into contracts for water in excess of that needed for project lands. A first right for project lands, such as those in the Sunnyside Valley and Yakima-Tieton Irrigation Districts, was preserved. 43 U.S.C., 523 *et seq.*, Act of February 21, 1911, 36 Stat. 925.

After the 1914 Act and before the 1940 Act was adopted, the United States entered into Warren Act contracts for "excess" waters with three non-Indian districts, and, notably, the U.S. Indian Service for the reservation for yearly delivery of a total of 945,000 and 1,347,000 acre feet of such waters by 1921 and 1936, respectively.[48]

CIVIL 21.

On October 12, 1939, the United States, as plaintiff, commenced this lawsuit in the United States District Court for the Eastern District of Washington (herein referred to as "Civil 21"). E.R. 2. The case grew out of a long-standing dispute between the Sunnyside Valley Irrigation District and the Bureau of Reclamation. The United States' complaint, however, was not so limited. It alleged that the plaintiffs, the defendant and water users of the project had interrelated and interdependent water rights from a common source, and that in low water years no more water was available than needed to fulfill water supp-

ly contracts. E.R. 14, 15, 20, 21. It also alleged that lands, orchards, homes, towns, roads, schools and other features valued then at more than $10,000,000.00 and an increase in population of the Yakima Valley of from 35,000 to 100,000 people largely dependent upon the project had occurred in reliance on project water rights. E.R. 22, 23.

The United States asked the District Court to declare its rights and the rights of other plaintiffs against the defendants, and the rights of the several defendants against each other. E.R. 29(d)(e). Any condition precedent to these broadly-stated prayers for relief were satisfied by the decision in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir., 1943) *cert. den.* 320 U.S. 792.

Consistent with the relief requested by the United States, several defendants asserted counterclaims requesting the joinder and adjudication of the rights of all users of waters of the basin. E.R. 53, 54, 59, 60, 66. Thus, the case included the issue of a general adjudication of the water rights of the basin. Statement to the Court, p. 1; E.R., page 107; Appendix, p. 91.

On January 31, 1945, following intensive efforts by the United States to bring about a settlement, a Consent Judgment (herein the 1945 Judgment) was presented by the United States and entered by the District Court.

The 1945 Judgment states that the United States and the other parties had settled all issues in the case and that it represented the agreement of the parties as to those issues. 1945 Judgment, p. 1; E.R. 117; Appendix, p. 111. Attorney Chaffee, representing the Sunnyside Valley and Yakima-Tieton Irrigation Districts stated on the record, in open court without contradiction by the several counsel who were present for the

United States, that the judgment:

> [C]overs the situation quite completely, and, in effect there is an adjudication of the water rights of the Yakima River and its tributaries.

Colloquy with Judge Schwellenbach, January 31, 1945, pp 23-24; Appendix pages 205.

The judgment was, indeed, comprehensive. Its coverage provided for allocation of 80% of the total diversions of surface waters of the Yakima basin to the twenty-one parties, including the United States, and, with the provision in paragraph 19 for certain other water rights, recognized and provided for delivery of 89% of such diversions.[49]

The 1945 Judgment specifically mandated that the United States deliver the 720 cubic feet per second of water in perpetuity for land within the Yakima Indian Reservation pursuant to the Act of August 1, 1914, 38 Stat. 582, and 100,000 acre feet in accordance with the Act of July 1, 1940, 54 Stat. 707. 1945 Judgment, ¶ 4, pp. 13, 14; E.R. 129, 130; Appendix p. 141. The 720 second feet of water was exempt from proration in case of shortage. 1945 Judgment, ¶ 19, p. 27; E.R. 143; Appendix p. 177.

Mr. Veeder of the Department of Justice and representing the Indian interests assured the court when the judgment was entered that all the Indian rights were under the Wapato Division and paragraph 4 of the 1945 Judgment. Colloquy, pp. 17-18; Appendix, p. 192. He also assured the court that the judgment and all its articles had been reviewed and approved by the Department of the Interior, which represented the Indian Service, and that the Department of Justice represented the Indian Service. *Id.;* Appendix, p. 193.

Counsel for the United States conceded in the October 29, 1980 proceedings that the United States, in 1945, was representing the Wapato Project as an arm and instrumentality of the Indian Service created to enable it to discharge its trust and supervisory responsibility with regard to Indians, but not "directly" representing all or any of the interests of the Yakima Indian Nation. October Transcript, pp. 49, 50. He then recanted as to the representation of the Tribe, stating:

> Obviously the Bureau of Indian Affairs was attempting to protect the Yakima Nation, and they were trying to act in their best interests but in the sense of saying did he represent the Yakima Indian Nation, and the answer is no, he did not.

October Transcript, p. 50.

At the October 29, 1980, hearing the District Court appeared to recognize that Indian irrigation rights were represented by the United States in Civil 21, but felt that the issue of water for fish was not disposed of then. October Transcript, pp. 65, 74-77.

The 1945 Judgment, as between the parties, declared their respective water rights as to times and quantities to be delivered, and established a relative priority between them by providing that in time of shortage certain parties or rights would share the shortage proratably while other parties and rights would not be subject to proration. 1945 Judgment, ¶ 18, 19, pp. 26-29; E.R. pp. 142-145; Appendix p. 181; Statement to the Court, pp. 2, 8, 9; E.R. p. 108, 114, 115; Appendix, pp. 92, 105,-9.

The intent that the 1945 Judgment be a final determination as between the parties is expressed in paragraph 20 of the judg-

ment. There the judgment is stated to be a final determination of the duty of the United States to deliver water from the Yakima River and its tributaries, from storage and other sources to the parties and to lands within the Wapato Indian Irrigation Project. Further, the United States, along with all of the other parties, was forever enjoined from asserting any claim to or interfering with any of the rights to use or delivery of the quantities recognized in the judgment. 1945 Judgment, ¶ 20, p. 29; E.R. p. 145, Appendix, p. 181; see also Statement to the Court, pp. 2, 9; E.R. p. 108, 115; Appendix, pp. 92, 109.

The rights of certain non-parties whose rights had previously been recognized by the United States were recognized and exempted from proration but without prejudice to the rights of the parties. 1945 Judgment, ¶ 19, pp. 27-29; E.R., p. 143, 145; Appendix, pp. 180, 181. The rights of parties versus non-parties generally are not to be prejudiced by the judgment. 1945 Judgment, ¶ 20, pp. 29-30; E.R., p. 145, 146; Appendix, p. 182.

When the judgment was entered counsel for the United States represented to the court that the non-parties referred to in paragraph 20 were "such parties or users who are not within the jurisdiction of the court in the present proceeding." Statement to the Court, p. 9; E.R., p. 115; Appendix, pp. 109, 110.

Finally, the District Court retained a limited jurisdiction over matters of interpretation and administration of the judgment. 1945 Judgment ¶ 20, p. 30; E.R., p. 146; Appendix, p. 183. Counsel stated that jurisdiction was retained "so far as essential for proper administration." Statement to the Court, p. 2; E.R., p. 108; Appendix, p. 92.

THE STATE GENERAL ADJUDICATION OF THE YAKIMA BASIN

In October 1977, the State of Washington began an action in Superior Court for Yakima County, Washington (Cause No. 77-2-01484-5) pursuant to Chapter 90.03 of the Revised Code of Washington for a general adjudication of the surface waters of the Yakima River basin (herein "Acquavella"). *Department of Ecology v. Acquavella,* 100 Wn. 2d 651, 674, P.2d 160 (1983). Over 4,000 defendants, representing in excess of an estimated 40,000 individual water users were served. By September 1, 1981, over 2,100 claims had been filed in the state court proceedings. *Department of Ecology v. Acquavella, supra.* Those claims included claims by the United States on behalf of the Yakima Indian Reservation asserting the treaty reserved water rights of the Yakima Indians.

In the meantime, on November 25, 1977, the state general adjudication action was removed to the United States District Court for the Eastern District of Washington, Civil No. C-77-347. By an order entered January 12, 1979, the District Court remanded the case to the Washington state court on the basis of the policy of the McCarran Amendment, 43 U.S.C. Section 666, as interpreted by *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

On April 13, 1982, a United States' motion in state court to dismiss was denied on the ground that the action was for a general adjudication and the United States was, accordingly, a proper party defendant and the court had jurisdiction to hear and determine claims for reserved treaty water rights of the Yakima Indian Nation.

The state court proceedings have continued to this date.

THE REQUEST FOR INSTRUCTIONS AS TO RELEASE OF STORAGE WATER TO PRESERVE FISH

On April 26, 1977, the District Court acting under paragraph 20 of the 1945 Judgment appointed William G. Gray, the superintendent of the Yakima Project, as Watermaster.

In the fall of 1980, approximately 60 salmon redds (nests of salmon eggs) were discovered in a stretch of the Yakima River in locations where they would be left dry and die if water were stored for the 1981 irrigation season in the usual way. November Transcript Vol. 2, 109. In response to a request by the Yakima Indians, Gray on October 28, 1980, sought instruction from the District Court whether he should store water for irrigation or release it to save the salmon eggs. E.R. 147.

The District Court held a hearing on Gray's request on October 29, 1980. The parties received about one and one-half days notice of the hearing. See, for example, October Transcript 102, 57, 64, 66, 109. At the outset, the court took the position that unless there was a specific abrogration or rescission of the Treaty fishing right with provision for just compensation, the treaty right had priority over the rights recognized in the 1945 Judgment. October Transcript 19. The question was one of priority between the rights recognized in the 1945 Judgment and the treaty right to water for fish, October Transcript 63-64. The Court stated that fishing right was not disposed of or abrogated in 1945. October Transcript 76-77. It ruled that the Watermaster was to maintain a minimum flow in the river adequate to maintain the salmon redds pending an evidenciary hearing to be held a month later. October Transcript 102, 115. Instructions to Watermaster, October 30, 1980. E.R. 160. App. p. 59.

At the next hearing on November 25 and 26 in Spokane, Washington, the District Court refused to enter into any consideration of the questions relating to the validity or priority of the Tribe's treaty right to water for preservation of the salmon redds. It continued to recognize the priority of the use of water for the salmon redds over storage for irrigation. November Transcript Vol. 2, p. 161-165; Supplemental Instructions to Watermaster, November 28, 1980, E.R. 171. App. pp. 66, 67.

The Court of Appeals confirmed these instructions, ultimately, by its amended opinion of June 17, 1985. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District,* 763 F.2d 1032 (9th Cir., 1985). It said that because the 1945 Judgment was not intended to be a general adjudication and the factors articulated in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) were not present, the District Court was not required to dismiss in favor of the state general adjudication. 763 F.2d at the 1034-1035. It also held that because the 1945 Judgment was not a general adjudication and did not adjudicate treaty rights of the Tribe, the irrigators' res judicata arguments were rejected. 763 F.2d at 1035. Finally, it upheld the instructions to the Watermaster as reasonable emergency measures in the exercise of the discretion of the District Court. 763 F.2d at 1035.

A. The Special Importance of This Case.

The Ninth circuit has, once again, rendered a decision with dangerous potential to unsettle established water rights throughout the west. Water is essential to the survival of the people and the economies of the desert west. Throughout the region rights to use of water are in potential conflict with

federally reserved rights, particularly Indian reserved water rights.

In the early twentieth century conflicts between Indian reserved and state water rights were in an unknown number of instances resolved by consent judgments negotiated and entered by the United States on behalf of Indian tribes that, typically, were not parties to or directly represented as parties. Earlier adjudications also may have directly involved less than all of the water rights of the stream systems in question.

The June 14, 1985 decision of the Court of Appeals threatens to unsettle, and by virtue of the early priority and lack of quantification of Indian reserved water rights, jeopardize previously settled water rights. The jeopardy extends not only to state rights existing at the time of settlement but all subsequent development based on state law water rights. The decision threatens not only the economy and population of one of the most productive agricultural areas in the United States, but also, precedentially, the stability and certainty of water rights elsewhere in the west based upon such negotiated consent judgments.

The decision should be reversed because it disregards well-grounded rules developed by this court as to the policies of the McCarran Amendment, 43 U.S.C. § 666, res judicata in partial as well as general adjudications of water rights, and the representation of Indian interests by the United States.

B. Basis of District Court Jurisdiction.

The jurisdiction of the District Court was based on the predecessor of 28 U.S.C. § 1345 and the jurisdiction it retained solely to interpret and administer the consent judgment entered

in this case January 31, 1945. 1945 Judgment, ¶ 20, E.R. 146, App. p. 183.

ARGUMENT

THE BASIC CONFLICTS WITH THE LAW AS ESTABLISHED BY THE UNITED STATES SUPREME COURT

1. THE DOCTRINE OF WISE JUDICIAL ADMINISTRATION.

The rulings of the District Court and the Court of Appeals violate the principles of wise judicial administration as established by this Court in *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 103 S. Ct. 3201, 3206, 2315, (1983); *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 816-820 (1976). *(Akin)*

The Court of Appeals ruled that Civil 21 was not a general adjudication and the 1945 Judgment did not implicate the treaty reserved water rights of the Yakima Indians.

The District Court did not merely interpret the 1945 Judgment in 1980. It went on to partially adjudicate a newly-asserted treaty reserved water right with priority superior to all irrigation water rights recognized in 1945. The issue was not marginal, but went to the heart of the state general adjudication.

The 1979 remand of *Acquavella,* established the presence of the *Akin* factors and held that wise judicial administration required the adjudication of Yakima River basin water rights in state court. It established that Washington had a comprehensive system for adjudicating water rights which would lead to a general, unified water rights adjudication and extensive

involvement of state water rights. It set proceedings in Yakima in the center of the river basin, rather than remotely in Spokane.

By October, 1980, the state court proceedings had been underway for almost three years. Over eighteen months had passed since the case had been remanded. The state case has proceeded since then with the active participation by the United States on behalf of the reserved water rights of the Yakima Indians.

At the October 29, 1980 hearing, the irrigators had little advance notice, but the principals of the *Akin* case and the remand of *Acquavella* were called to the attention of the District Court. October Transcript 78-84, 97. This new federal proceeding in Civil 21 to adjudicate the treaty reserved water right for fish was not so far advanced then as to preclude its deferral to the state court.

The Court of Appeals justifies retention by the District Court because Civil 21 was not a general adjudication. That rationale would exempt federal piecemeal adjudication of water rights from the *Akin* doctrine after any remand. 763 F2d at 1035. It departs fundamentally from rulings in *Arizona v. San Carlos Apache Tribe*, 562 U.S. 545, 103 S. Ct. 3201, 3206, 3215 (1983); *Colorado River Water Conservation District v. United States* 424 U.S. 800, 816-820 (1976).

2. THE RULE OF RES JUDICATA

Neither the United States nor either of the lower courts concede that the doctrine of res judicata applies in any relevant way to the United States in this acton. They disregard the actual participation by the United States in Civil 21 and the importance of the doctrine especially in the case of water rights.

The Court of Appeals, in a particularly egregious way, repudiates the general policy of the rule of res judicata as adopted by this court by denying any res judicata effect to the 1945 Judgment on the ground that Civil 21 was not a general adjudication.

Finally, the long-established rules governing the res judicata effect of participation by the United States in actions involving Indian interests are disregarded on specious, and narrow grounds which ignore the decisions of this court.

The continued disregard of these salutary principles undermines the economy and people of the Yakima basin who are almost entirely dependent upon reliable water rights for their existence and threatens others in the west who are similarly situated.

a. Res Judicata, Generally and in Water Right Cases.

The contention of the United States and rulings of the District Court and the Court of Appeals that there is a super priority, reserved, instream right to use of storage waters for the migration and spawning of salmon do not stand in light of the participation by the United States in Civil 21 and the express incorporation of the Tribe's Congressionally modified treaty reserved water right under the Act of August 1, 1914 into the 1945 Judgement.

These Petitioners do not contend that Article III of the Treaty with the Yakimas has been abrogated; only that any reserved right to use of the surface waters which might be implied from the treaty fishing right has been limited by the specific dealing by the United States with the use for irrigation of all waters of the Yakima basin, particularly in the 1945 Judgement.

The overriding intent of the United States from the outset of its project to develop the Yakima River basin for irrigation was that the project would operate free of claims which could embarrass it. Development has proceeded in reliance on that policy. The United States should, therefore, provide substitute means to satisfy the treaty fishing rights without repudiating its long-standing commitment (approximately eighty years) for the irrigation of the Yakima River basin. It, however, has, instead chosen to burden, impair and take the water rights of farmers.

When it adopted the Act of August 1, 1914, the Congress only partially repudiated the act of the Secretary in 1906 limiting Indian's water rights. Quantification at 147 second feet was repudiated, the concept of limitation ratified. Thus, the guaranteed flow was increased to 720 second feet, free of storage charges, but the limitation was adopted by the insertion into the legislation of language declaring that the provision of the additional water was "considered as equivalent to and in satisfaction of the rights of the Indians in the low water flow of the Yakima River." 38 Stat. 604. Further, Congressional ratification is found again in 1940 when the 720 second feet of water was recognized as a maximum as well as a minimum supply of the modified treaty water right and Congress raised the limit by 100,000 acre feet per year. Act of July 1, 1940, 54 Stat. 707, Appendix, p. 75.

The limitations inherent in the Acts of 1914 and 1940 are incorporated by the United States into the 1945 Judgment. If its intent were that other claims be preserved the United States should have asserted them then.

Because Civil 21 dealt with property rights, the water rights of the parties, *Ickes v. Fox*, 300 U.S. 82 (1937), there was a clear need for final resolution of all claims before the court. The parties were, therefore, obliged to advance in Civil 21 every claim of title arising out of events which had occurred before the suit was started. *Northern Pacific Railway v. Slaght*, 205 U.S. 122 (1907); *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1903) (United States as trustee for Kalamth Indians precluded by judgment in an action brought earlier by the United States on its own behalf); *Hatchitt v. United States*, 158 F. 2nd 754 (9th Cir., 1946).

In 1945 the United States may have (see the provision in paragraph 17 of the judgment for minimum flows of water for fish life) and certainly might have raised its claim that the treaty reserved water rights of the Yakima Indians included that right to take water from irrigation storage for the benefit of fish life in the basin. In any case, under the general rule that all claims which were or might have been raised are precluded, the latter day claim by the United States to the use of additional water for fish life is precluded by the 1945 Judgment. *Nevada v. United States*, 462 U.S. 110, 103 S. Ct. 2906 (1983); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Commissioner v. Sunnen*, 333 U.S. 591, 597, 598 (1948). The claims in the case were, at least between the parties, sufficiently broad to require the United States to raise the issue.

When it started Civil 21 the United States waived its sovereign immunity as to claims which might be asserted in the action by defendants in recoupment arising out of the same transaction or occurrence that was the subject matter of its

claim. Defendant's counterclaims were permitted to the extent necessary to defeat the claims of the United States. *United States v. Fidelity & Guarantee Co.,* 309 U.S. 506 (1940) citing *Bull v. United States,* 295 U.S. 247, 261 (1935). The United States consented by implication to the full and complete adjudication of all matters reasonably incident to its lawsuit. *Lukenback v. The Thekla,* 266 U.S. 328, 339, 340 (1924); *United States v. Martin,* 267 F.2d 764, 769 (10th Cir., 1959). The District Court in 1945 had jurisdiction to entertain claims for a general adjudication not only because of the ruling in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir., 1943) *cert. den.* 320 U.S. 692, but because the rights of the parties and the rights of others users of water from the Yakima system which the United States expressly asked the court to determine were so interrelated and interdependent. *New Mexico, ex rel. Reynolds v. Molybdenum Corp.,* 570 F.2d 1364 (10th Cir., 1978). See the complaint. E.R. 14, 15, 20, 21, 22, 23, 26, 27, 29.

When the 1945 Judgment was presented for entry the United States admitted that an adjudication of the Yakima River was necessitated by the counterclaims. E.R. 107.

The Court of Appeals has, once again, forgotten that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time. It is a rule of fundamental and substantial justice, of public policy and private peace which the court should cordially regard and enforce. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, (1981). Nowhere is this more apparent or important than in the area of water rights in the desert west. *Arizona v. California,* 460 U.S. 605, 103 S. Ct. 1382, 1391-1395 (1983). In

that case this court decided that the rules of preclusion should inform its decision although those rules were not strictly appliable. "Certainty of rights is particularly important with respect to water rights in the Western United States." 103 S. Ct. at 1392. The recalculation of the Yakima treaty reserved water right at this late date would bring with it destructive consequences of the type envisioned by this court when asked to recalculate irrigable acres under the standard adopted in the *Arizona* case:

> Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to the states of the southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado river system. 'In the arid parts of the West . . . claims to water for use of federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.' *United States v. New Mexico*, 438 U.S. 696, 699, 98 S. Ct. 3012, 3013 (1978). If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon" reduction in the amount of water available for water-needy state and private appropriators. *Id.*, at 705, 98 S. Ct. at 3016. As Special Master Tuttle recognized, 'not a great deal of evidence is really needed to convince anyone that western states would rely upon water judications.' Tuttle Report at 46. Not only did the Metropolitian Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocations cannot help but exacerbate potential water shortage problems for these projects and their States.

103 S. Ct. at 1392-93.

b. The Alleged Requirement of General Adjudication.

In a classic *non sequitur* the Court of Appeals reasoned from the decision of this court in *Nevada v. United States,* 463 U.S. 110 (1983) (which did not so hold) that because Civil 21 was not a general adjudication, the 1945 Judgment was not entitled to a res judicata effect. 763 F.2d at 1035.

First, it is clear that in a federal court water adjudication the United States is bound and precluded by the judgment entered there even though the action is not technically a general adjudication. *Arizona V. California, supra,* affected only the mainstream of the lower Colorado, excluded the tributaries, did not join individual water users, particularly those holding presently perfected rights including Indian treaty reserved water rights. Nevertheless, although the proceedings were not final, res judicata effect was given to the decree entered in those proceedings in 1964, even though the decree, in its Article IX, expressly reserved to the court powers of modification in terms far broader than any found in paragraph 20 of the 1945 Judgment, namely:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

103 S. Ct. at 1391.

The Court of Appeals also disregarded citations to its own opinion on point in *United States v. Fallbrook Public Utility District,* 347 F.2d 48, 57, 58, 60 (9th Cir., 1965) which gave binding effect between the parties and their successors to a consent judgment involving less that all of the water rights in

a stream system. That the United States was seeking rather than opposing the binding effect of the jugment there should not be a distinguishing fact. See also *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371 (1910).

The claims before the court in Civil 21 at the time of entry of and settled by the 1945 Judgment included all of the rights of the United States and all other parties to the use of the surface waters of the Yakima River basin. As between the parties, the 1945 Judgment was intended to be and is a general adjudication of res judicata as to all water rights held by them in combination.

c. The Rule of United States' Representation of Indian Interests.

The Court of Appeals suggests that the 1945 Judgment settled only the rights of the irrigation districts made parties to Civil 21. 763 F.2d at 1035, n. 4, totally ignoring any effect of the judgment on its author, the United States. The United States was in the case as trustee and holder of water rights for the Yakima Indians, particularly those rights covered by the 1914 and 1940 Acts.

The United States as trustee was bound as to water rights which it asserted and might have asserted. The 1945 Judgment, thus, precludes claims for additional, treaty reserved water rights for both irrigation and fish life. *Nevada v. United States, supra.*

The participation by the United States in Civil 21 as trustee for the Indians bound the Indians. *Arizona v. California,* 460 U.S. 605, 103 S. Ct. 1382, 1389, 1395, 1396 and n. 20 (1983); *Nevada v. United States,* 462 U.S. 110, 103 S. Ct. 2906 (1983);

Heckman v. United States, 224 U.S. 413 (1911); *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1903)

The Court of Appeals seeks to avoid the res judicata effect of the 1945 Judgment by stating:

> The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation. 762 F.2d at 1034.

Citing paragraph 20 of the judgment.

Paragraph 20, however, does not specifically mention the Yakima Nation or any Indians.

When the judgment was presented, the court was assured that this reference to those "not made parties" was to claimants or users who were not within the jurisdiction of the court in Civil 21. Statement to the Court, p. 9; E.R. 115; Appendix, pp. 109, 110. United States attorney Veeder represented that all the Indian rights were in the Wapato Division. Colloquy with Judge Schwellenback p. 17, App. p. 192.

In view of the history of the project and bitter conflict over Indian rights resolved by the 1914 Act, the specific reference to the 1914 Act in the 1945 Judgment, the pivotal importance of limitation of the first priority Indian treaty water rights to the stability of the project, the indisputable jurisdiction of the District Court as to the United States, the legal precedents as to representation of the Indians by the United States, and the critical importance of the stability of the water rights adjudicated in 1945 to the economy and a large and growing population of the Yakima basin, it is not credible to interpret that clause in Paragraph 20 as excluding the Indian interests, at least some of which are specifically dealt with, from the operation of the judgment.

Paragraph 20 did not contemplate a departure from the fundamental principles of finality so as to permit retrial of Indian rights and interests settled and resolved before the court by the United States and the other parties forty years ago. *See Arizona v. California*. 460 U.S. 605, 103 S. Ct. 1382, 1391-1394 (1983). Finality was intended.

The long-standing and important rule of the binding representation of Indian interests by the United States was not set aside by the judgment entered in 1945.

CONCLUSION

The decisions of this court, and the stability and well-being of a large and important agricultural economy and its people require that the water rights of the Yakima River basin be left in repose. The implications of this case as to other settlements of Western water rights in the earlier years of this century require that the binding effect of the 1945 consent judgment be preserved.

Finally, direction of the lower federal courts to prevent piecemeal water rights adjudications after a remand to state court under the McCarran Amendment is urgently needed.

Respectfully submitted,

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Attorneys for Petitioners
September, 1985

FOOTNOTES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

(1) Yakima Valley Water Management Study, "A Status Report on Water Quality Investigations, Yakima River Basin, Washington, for U.S. Bureau of Reclamation (Contract 14-06-100-9158)" by CH2M Hill, May, 1977. (Herein "Status Report", May, 1977) at page 1.

(2) Status Report, May, 1977, page 10.

(3) "Consequences and Responsibility in Drought Forecasting: The Case of Yakima, 1977." Michael H. Glantz, Environmental & Societal Impacts Group. National Center for Atmospheric Research, March, 1981. (Herein "Consequences"), page 9.

(4) "Status of the Water Resources Planning Program in the Yakima Basin", Robert T. Milhous, October, 1975, Department of Ecology, State of Washington, Olympia, Washington, (Herein "Report No. 24"), Appendix A, page 1; Status Report, May, 1977, page 3.

(5) Report No. 24, Appendix A, page 1.

(6) Report No. 24, Appendix A, page 1.

(7) "Yakima Valley Water Management Study", Washington, Status Report, March, 1977, U.S. Bureau of Reclamation, Pacific Northwest Region, Boise, Idaho, (Herein "Status Report, March, 1977, page 3; Consequences, page 10.

(8) Report No. 24, Appendix A, page 1.

(9) Status Report, May, 1977, page 4.

(10) Status Report, May, 1977, page 21.

(11) Status Report, March, 1977, page 5.

(12) Status Report, May, 1977, page 5.

(13) "C.R. Lentz Review, Yakima Project Water Rights & Related Data", Preliminary Records, United States Department of the Interior, Bureau of Reclamation, Pacific Northwest Region, Yakima Project, Washington, December, 1974. (Herein "Lentz Review") pages 5, 10.

(14) Status Report, May, 1977, page 21.

(15) Status Report, May, 1977, page 7.

(16) Status Report, May, 1977, Map following page 7; Affidavit of Louis B. Hilderbrand dated May 27, 1982 in *Holly v. Totus,* U.S. District Court, Eastern District of Washington, Civil Cause No. C-7802.

(17) In 1902 and 1907, there were an estimated 121,000 acres under irrigation in the Yakima Basin. Status Report, May, 1977, page 4.

(18) Affidavit of Louis B. Hilderbrand, *supra,* page 2.

(19) Report No. 24, page 1.

(20) Consequencs, page 10; "Status of Water Quality in the Yakima Basin from 1976 to 1979", Water Power and Resources Service, Pacific Northwest Region, Boise, Idaho, May, 1980, (Herein "Status Report", May, 1980), page 5.

(21) Crop Production Reports compiled by U.S. Bureau of Reclamation, Yakima Project for 1981.

(22) Status Report, May, 1977, pages 10, 11.

(23) *Ibid.*

(24) Crop Production Reports compiled by U.S. Bureau of Reclamation, Yakima Project for 1981.

(25) "Report on Conditions of the Yakima Indian Reservation, Wash." H.R. Doc. No. 1299, 62d Cong., 3d Sess. (October 22, 1912), page 24 (Herein H. Doc. 1299).

(26) H. Doc. No. 1299, page 15; Letter, December 12, 1905 from E.A. Hitchcock, Secretary of the Interior to Representative W.L. Jones printed in "Impounding Waters and Indian Tuberculosis Sanitarium, Report of the Joint Congressional Commission" S. Doc. No. 337, 63d Cong., 2d Sess. (December 20, 1913) (Herein S. Doc. 337) at pages 341-342.

(27) *Cf.* Ex. 4, Lentz Review, pages 2,3,9.

(28) H. Doc. 1299, page 15; S. Doc. 337, pages 374-375.

(29) H. Doc. 1299, pages 16-17.

(30) U.S. House of Representatives, Document No. 505, December 20, 1913, 63d Cong., 2d Sess., pages 8, 9.

(31) Cong. Rec. July 1, 1914, pages 11467, 11468; Cong. Rec. July 29, 1914, page 12946; House Document No. 1299, 62d Cong., 3d Sess. (Herein H. Doc. 1299).

(32) House Document No. 1304, 62d Cong., 2d Sess. (January 25, 1913 (Herein H. Doc. 1304) esp. pages 5-6.

(33) Indian Appropriation Act of June 30, 1913, Sec. 23, 38 Stat. 100; S. Doc. 337.

(34) Indian Appropriation Act of June 30, 1913, 38 Stat. 100.

(35) "Report and Recommendations of the Joint Commission on Indian Tuberculosis Sanitarium and Yakima Indian Reservation Project" Senate Document No. 337, 63d Cong., 2d Sess., December 20, 1913 (Herein S. Doc. 337); House of Representatives Document No. 505, 63d Cong., 2d Sess., December 20, 1913 (Herein H. Doc. 505).

(36) S. Doc. 337, pages 38, 56, 77, 85-86, 93, 117, 122, 123, 183, 362.

(37) S. Doc. 337, page 24; H. Doc. 505, page 8.

(38) Indian Appropriation Act of 1913, 38 Stat. 100.

(39) H. Doc. No. 505, page 1; S. Doc. 337, page 1.

(40) S. Doc. No. 337, pages 45-47.

(41) H. Doc. No. 1304, pages 5-6; H. Doc. 1299; S. Doc. 337; Cong. Rec., February 25, 1913, page 3901.

(42) S. Doc. No. 337; pages 35-36, 38, 41, 42, 46, 57-58, 69-72, 78-83, 114-117, 136-137, 140-143, 147-150, 356.

(43) Cong. Rec., pages 10595, 10596, 10599, 10653, 10770, 10771, 10773-10789, 10936-10943, 11019-11021, 11023-11029, June 17, 18, 20, 22, 23 and 24, 1914; Cong. Rec., page 12949, July 29, 1914.

(44) S. Doc. No. 337, pages 112-113, 170.

(45) S. Doc. No. 337, page 369.

(46) House of Representatives, 76th Cong. 3d Sess., Report No. 2477, "Wapato Indian Irrigation Project Appropriation for Additional Water, June 7, 1940. (Herein H. Rep. No. 2477), pages 1-2.

(47) H. Rep. N. 2477, pages 2, 4-5.

(48) Ex. 4 Lentz Review, pages 89, 99, 106, 163.

(49) Affidavit of William G. Gray, Superintendent of the Yakima Project filed with the District Court in this case on May 17, 1978.

YAKIMA VALLEY WATER MANAGEMENT STUDY

YAKIMA RIVER BASIN
WASHINGTON

STATUS REPORT
March, 1977

U.S. Bureau of Reclamation,
Pacific Northwest Region
Boise, Idaho

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

UNION GAP IRRIGATION DISTRICT;
YAKIMA-TIETON IRRIGATION DISTRICT;
YAKIMA VALLEY CANAL COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

I, DONALD H. BOND, a member of this bar of this Court hereby certify that three copies of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit," were mailed by first class, postage prepaid mail, on September 12, 1985, to each of the following:

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85-451

NO._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

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226 pp

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT,	)	
Plaintiffs-Appellees,	)	NOS. 80-3505
	)	81-3002
vs.	)	81-3068
	)	81-3069
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	DC# Civil No. 21
Defendants-Appellants.	)	A M E N D E D
	)	O P I N I O N

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush,
Presiding

(Argued and Submitted July 8, 1982 - Seattle)
Decided February 6, 1985;
Amended June 14, 1985

Before: KILKENNY, WRIGHT, and CANBY,
Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from

publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District (Sunnyside), Union Gap Irrigation District (Union Gap), and Yakima Valley Canal Company (Yakima Valley), supported by amicus curiae briefs of the State of Washington, are denied. The petitions for rehearing by Sunnyside, Union Gap, Yakima Valley, and Yakima-Tieton irrigation District filed after our February 6, 1985 opinion are also denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

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the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

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The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nation's treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster regarding the 1980 to 1981 non-irrigation season. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; and (3) monitoring of the redds' condition. The court also ordered a study of methods for subsequent irrigation seasons (including regulation of reservoir releases during the spawning season) that would accomodate the needs of farmers and, at the same time, preserve the salmon run.

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Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

ANALYSIS

The district court did not exceed the scope of its retained jurisdiction under the

consent decree.[1/] Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof."

1/Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 861, 66 L.Ed.2d 802 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam).

Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The Court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River Basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977). Appellants' reliance on Colorado River Water Conservation District v. United States (Akin), 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[3/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

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area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate

the treaty rights of the Yakima Nation,[4/] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels

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4/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It was empowered to issue orders directing the allocation of water within the Yakima River system. Its orders

authorizing the watermaster to preserve the 1980 redds were reasonable emergency measures.

The order for further study of the problem was reasonable under the circumstances. The study would provide data necessary to insure future disputes could be resolved in the most efficient way.

We affirm the district court's orders.[5/]

5/ We need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT, UNITED STATES, et al.,	)	Nos. 80-3505, 81-3002, 81-3068, 81-3069
Plaintiffs-Appellees,	)	
vs.	)	
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	DC# Civil No. 21
Defendants-Appellants.	)	OPINION

Appeal from the United States District Court for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding

[Argued and Submitted July 8, 1982]

Before: WRIGHT, KILKENNY, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of

salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nations' interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering the reservation . . . also the right of taking fish at all usual and accustomed places, in common with

citizens of the Territory . . . . " 12 Stat. 25, 27 (1859).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation

releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nations' treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered

release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; (3) monitoring of the redds' condition; and (4) study of methods for subsequent irrigation seasons (including regulation of reservoir releases during the spawning season) that would accommodate the needs of farmers and, at the same time, preserve the salmon run.

The irrigation districts argue that the court lacked jurisdiction because its orders exceeded the scope of authority reserved in the consent decree. Alternatively, they

argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing righ was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

Jurisdiction [1/]

The district court did not exceed the scope of its retained jurisdiction under the consent decree. Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof." Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The court properly assumed jurisdiction to interpret the decree in light of the Nations' treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977).[3/] Appellants' reliance on Colorado River Water Conservation District vs. United States, (Akin), 424 U.S. 800 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights

automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[4/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Substantive Basis of the Orders

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667 (1979) (Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States vs. Winans, 198 U.S. 371, 381 (1905) (Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of or

interference with their reserved rights. United States v. State of Washington, 506 F.Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either the Indians' access to fishing grounds or the amount of fish present there. Id. The government constructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980, the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants

argue, the consent decree or prior Congressional action abrogated the Yakima Nations' Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s. Indian Appropriation Act of 1914, ch.222, 38 Stat. 582, 604. Later contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocted to the Indians 720 c.f.s. without proration, and the additional contract amounts, subject to proration.

We fail to see how determination of the Yakima Nations' entitlement to water for irrigation abrogated or limited their fishing right. Part of the confusion arises from appellants' mischaracterization of the district court's action as recognition of an implied reserved water right.[5/] We do not affirm the district court's orders on the basis of whatever water rights may be reserved to the Yakima Nation to fulfill vital purposes of its Treaty. We base our holding solely on the Nations' Treaty fishing right.

This clarification eliminates appellants' res judicata argument as well. Appellants rely on United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 666 F.2d 351 (9th Cir. 1981). In Truckee we held that a 1944 general federal water adjudication barred a 1973 action seeking a declaration of a reserved water right in the Paiute Indians for preservation of their fishery in Pyramid Lake and the Lower Truckee River. Not only is no reserved water right implicated in this case, but the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin.[6/]

Propriety of the Corrective Measures Chosen

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of

the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The court ordered these measures taken, including transplantation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these

measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It properly weighed the interests involved[7/] and the emergency nature of the problem. Given more time in which to solve the problem, the release of water may not have been necessary. But, under these circumstances, the release was justified. We note with approval that the district court, in anticipation of future occurrences, ordered a report on means of meeting irrigation users' needs with less impact on the salmon run.

We affirm the district court's orders.

FOOTNOTES

1/ Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on

our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); Willis vs. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 1498 (1975) (per curiam).

2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

3/ The state, as amicus curiae, also urges this ground for reversal. According to its papers, the United States' motion to dismiss the state proceeding was denied. The United States then petitioned for reconsideration in light of our recent decisions of Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982).

Notwithstanding our decisions in these cases, the state court determined that it had jurisdiction over the United States as a representative of federally reserved Indian water rights. This decision was not timely appealed by the United States, but the Sunnyside Valley Irrigation District moved for discretionary review by the state appellate court. As of oral argument in our case, the state appellate court had not accepted review.

4/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

5/ The Treaty's purpose of preserving fishing rights of the Yakima Nation would not have been totally frustrated without the release of water. The temporary lack of water did not threaten either their access to traditional fishing grounds, or the entire

salmon run. The possible destruction of redds did threaten to diminish the value of their fishing right, but release of water was not the only apparent solution to prevent the destruction. Compare Cappaert v. United States, 426 U.S. 128 (1976) (District court could not find feasible alternatives for preserving the Devil's Pool and its rare fish other than maintaining the water level in the Pool).

A federal reservation of land contains an implicit reservation of water only if the purposes for which the land is reserved require water. Id. at 139. in Cappaert, the President set aside the Devil's Pool as a national monument because of its historic and scientific value. The reservation of the Pool would have been meaningless, however, if the water level was allowed to drop significantly. Id. at 140.

When pumping of ground water by nearby ranchers lowered the water in the Pool beyond safe levels, the district court enjoined further pumping based on an implied-reserved-water right. The Court affirmed the existence of this right, and further approved the district court's decision that the water in the Pool could drop so long as the necessary level was maintained. The court held that "the implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141 (our emphasis).

Cases use the same analysis in determining whether Indian reservations contain implicit rights to various bodies of water. See Arizona v. California, 373 U.S. 546 (1963) (reserved water right necessary to fulfill agricultural purpose of the land, in amount that will irrigate all practicably irrigable land on the reservation); Winters v. United States, 207 U.S. 564 (1908) (reservation of land useless unless imply a right to sufficient water to irrigate it); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 102 S.Ct. 657 (1981) (water right necessary to fulfill treaty purpose of ensuring access to fishing grounds). In each case, a guaranteed supply of water was required to preserve the reservations' purposes. Without the reserved water right, others could appropriate the water, frustrating the reservation.

Unlike these cases, correction of the redds problem does not require a guaranteed supply of water, to which others may not have access. The government's interference with the water level during the spawning season required the district court to take emergency measures, which included for a time releasing water from the dam. These measures were justified by the government's violation of its Treaty duties, not by any implied-reserved-water-right to water stored in the Cle Elum reservoir.

6/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to

various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication. The final decree settled only the rights of the irrigation districts made party to the proceeding.

In contrast, in Truckee the government framed its complaint in the broadest possible manner. It provided individual notice and widespread publicity of the action. The court gave interested parties every opportunity to present their claims in hearings over several years. The proceeding was adversarial and finally determined the rights of all involved. United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1308-1309 (9th Cir. 1981).

7/ At the November 25, 1980 hearing, the district court in fact observed that:

> I don't have any feeling at all that the irrigators in this case would prefer the salmon just disappear. I don't sense that feeling at all. I think they are sincere and legitimate in their concern about the waterflow, but I also feel that they are sincere in their concern for the salmon and, of course, the rights of the [I]ndians in regard thereto.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT,	)	
	)	Nos. 80-3505
	)	81-3002
Plaintiffs-Appellees,	)	81-3068
	)	81-3069
vs.	)	
	)	DC# Civil No. 21
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	O P I N I O N
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding
Decided February 6, 1985
[Argued and Submitted July 8, 1982]

Before: KILKENNY, WRIGHT, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from

publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District, Union Gap Irrigation District, and Yakima Valley Canal Company, supported by amicus curiae briefs of the State of Washington, are denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the

dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

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The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court

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The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

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Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by

Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

JURISDICTION[1/]

1/ Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Motley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); Willis vs. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

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on consideration of several factors,[3/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

3/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1,000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

SUBSTANTIVE BASIS OF THE ORDERS

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667, 99 S.Ct. 3055, 3064-65, 61 L.Ed.2d 823 (1979) (Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905) (Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of or interference with their reserved rights. United States v. State of Washington, 506 F.Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either

the Indians' access to fishing grounds or the amount of fish present there. Id. The government constructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980 the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants argue, the consent decree or prior Congressional action abrogated the Yakima Nation's Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute

such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s. Indian Appropriation Act of 1914, ch. 222, 38 Stat. 582, 604. Later contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocated to the Indians 720 c.f.s. without proration, and the additional contract

amounts, subject to proration. The United States was also a party to that decree.

Neither the Wapato Irrigation Project nor the United States represented the Indians for purposes of their fishing water rights. Fishing rights were not a subject of the 1945 dispute. No abrogation or limitation of fishing rights occurred when the irrigation rights were determined.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin,[4/] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent.

The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

4/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 103 S.Ct. 2906 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It had authority to interpret the 1945 consent decree in light of the Treaty fishing right. Its orders authorizing the watermaster to preserve the

1980 redds were reasonable emergency measures taken to protect the Treaty fishing right.

We need not decide the exact scope of the Treaty fishing right. It is enough to note that the Indians' fishing rights are protected and under these circumstances the release of water was justified to avoid damage to the redds.

The order for further study of the problem was a reasonable measure. The study would provide data necessary to insure future disputes could be resolved in the most reasonable and workable way.

We affirm the district court's orders.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al.,	)	
Plaintiff,	)	Civil No. 21
v.	)	INSTRUCTIONS TO THE WATERMASTER
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing on October 29, 1980, upon a motion on behalf of William G. Gray, the duly appointed and acting Watermaster in this proceeding, for instructions from this Court concerning the proper operation and management of certain reservoir facilities of the Yakima Reclamation Project during the non-irrigation season from October, 1980, to April 1981, in consideration of the

provisions of the 1945 consent decree on file in this case and the request of the Yakima Indian Nation that a flow of water in portions of the Yakima River be maintained to protect certain spawning areas for Spring Chinook Salmon in the Upper Yakima River Basin; and

The Watermaster appearing by Robert M. Sweeney, Assistant United States Attorney, and George Dysart, Department of Justice attorney, appearing for the Department of the Interior, and the Yakima Indian Nation appearing by James B. Hovis and Timothy Weaver, Attorneys at Law; and various irrigation districts named in the 1945 consent decree appearing by Donald H. Bond, Dennis Fluegee, Robert Frazier, Jay Sandlin, Charles Flower, and Jeffrey Simpson, Attorneys at Law; and

It appearing that it is the usual practice of the Project Manager of the Yakima Reclamation Project, (who is also the Watermaster in this action), to reduce flows from the various Project reservoirs at the end of the irrigation season in mid-October to provide for "carry-over" storage water for use during the next year's irrigation season, which closures significantly reduce the flow of water in the Yakima River; and at the end of the 1980 irrigation season the gates of the Lake Cle Elum reservoir were scheduled for closure on October 20, 1980; and

It further appearing that during the salmon spawning season in late summer of 1980 certain Spring Chinook Salmon migrated up the Yakima River and spawned in certain portions of the upper Yakima River and that some sixty "redds" or spawning areas have been

identified in that portion of the Yakima River lying between the entry of the Lake Cle Elum River into the Yakima River, and the Yakima Indian Nation has requested William Gray as Project Manager to maintain a sufficient flow in the afore-described reach of the Yakima River to safeguard the development of salmon fry from the redds, upon the Tribe's assertion that the salmon spawning area in the upper Yakima River Basin is a part of a fishery reserved to the Yakima Indian Nation and it's members pursuant to its treaty with the United States of June 9, 1855, and

It appearing that Mr. Gray has delayed the closing of the Lake Cle Elum Reservoir gates and has met with representatives of the Yakima Indian Nation, the irrigation districts, and the Fish and Wildlife Service

of the Department of the Interior, and that the Court has been requested to issue instructions to the Watermaster concerning the management of the facilities of the Project and the waters within the reservoirs and the Yakima River in view of the conflicting interests as to the management of said waters; and

Attorney George Dysart having requested that some additional time be granted before closure of the reservoir gates in order to allow the Secretary of the Interior to investigate the situation and to consider any possible alternative methods of operation that might be available; NOW, THEREFORE, upon consideration of the foregoing,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That to and until 8:00, A.M., Friday, November 28, 1980, a sufficient flow of water not to exceed 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), shall be maintained in that portion of the Yakima River lying between the confluences of the Cle Elum River and the Teanaway to protect and safeguard as nearly as possible the Spring Chinook Salmon Spawning area in that reach of the Yakima River; PROVIDED,

2. That the Watermaster is authorized to regulate the flows in the aforementioned reach of the Yakima River in such amount below 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster may find consistent with the protection of the spawning area after consultation with

biologists of the Fish and Wildlife Service of the Department of the Interior and the Yakima Indian Nation; and

3. That further hearing in this matter shall be held at 9:30, A.M., Tuesday, November 25, 1980, at the United States Courthouse in Spokane, Washington or at such earlier time or at such other place as may appear appropriate to the Court.

DATED this 31 day of October, 1980.

/s/ Justin L. Quackenbush
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert M. Sweeney
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al.,	)	
Plaintiff,	)	Civil No. 21
v.	)	SUPPLEMENTAL INSTRUCTIONS TO THE WATERMASTER
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing before this Court on November 25, 1980, pursuant to the Order of this Court entered October 31, 1980, directing that a further hearing be held to determine appropriate instructions to be issued to the Watermaster concerning the management of the reservoir facilities of the Yakima Reclamation Project during the non-irrigation period of October, 1980, to March/April, 1981; in view of certain Spring Chinook

Salmon spawning beds (hereafter referred to as "redds") having been located in that portion of the upper Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River and the Yakima River; and

The Watermaster, William R. Gray, appearing by Robert M. Sweeney, Assistant United States Attorney, and the United States appearing by George D. Dysart, Attorney, Lands and Natural Resources Division, Department of Justice; and the Confederated Tribes of the Yakima Nation, Amicus, appearing by James B. Hovis and Timothy Weaver, Attorneys at Law; and various irrigation districts named in the 1945 consent decree entered in this proceeding appearing by Donald H. Bond, Dennis L. Fluegge, Charles C. Flower, J. Jarrette

Sandlin, V. J. Beaulaurier, J. M. McArdle, Thomas Nelson, Robert M. Leadon, and H. K. Dano, Attorneys at Law.

It appearing to the Court as follows:

1. That in September, 1980, certain return Spring Chinook Salmon migrated up the Yakima River and spawned in portions of the upper Yakima River and fish biologists have located and identified some sixty spawning redds in that reach of the Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River; and

2. That following hearing on October 29, 1980, this Court on October 31, 1980, entered Instructions to the Watermaster which, among other things, directed the Watermaster to maintain a flow of water of approximately 650 c.f.s. in that portion of the Yakima River lying between the

confluences of the Lake Cle Elum River and the Teanaway River so as to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning redds in that reach of the River; and also directed that further hearing in the matter be held commencing on November 25, 1980; and

3. That certain of the aforementioned sixty salmon redds lying in certain side channels or on the periphery of the Yakima River channel are in immenent danger of damage and that measures could be taken to safeguard these redds by channelization of water flows and transfer of certain redds to more protected areas of the River, if such measures are implemented on an emergency basis; and

4. The United States appeared herein and advised this Court that the Secretary of

the Interior, among other things, recommends that sufficient waters be maintained in the Yakima River to provide nearly as possible for the development of the redds and the emergence of fry and that the stream conditions and reservoir releases be monitored to provide such protection as may be appropriate upon the advice of biologists of the United States.

5. That it is appropriate that the provisions of paragraphs 1 and 2, at page 3, of this Court's Instructions to the Watermaster entered October 31, 1980, be continued in effect through the remainder of the non-irrigation season, as supplemented hereafter, NOW THEREFORE,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That for the remainder of the 1980 to 1981 non-irrigation season, a sufficient flow of water approximating 650 c.f.s. (as measured by the Bureau of Reclamation gauging station on the Yakima River at Cle Elum) shall be maintained in that portion of the Yakima river lying between the confluences of the Cle Elum River and the Teanaway River to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning area in that reach of the Yakima River; PROVIDED, however, that the Watermaster is authorized to regulate the flow in the aforementioned reach of the Yakima River in such amounts below 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster in his discretion may find consistent with protection of the spawning area after consul-

tation with fish biologists of the Fish and Wildlife Service and the Yakima Tribe, and including Doctor Ernest A. Brannon and Dr. Victor W. Kaczynski,

2. That the Watermaster shall consult as soon as possible with the above-identified biologists and shall expeditiously undertake such protective measures as the Watermaster finds appropriate, including the following:

a. Transfer of the salmon eggs in those redds (approximately 12) found to be in imminent danger of damage to an appropriate area of the Yakima River as recommended by Drs. Brannon and Kaczynski.

b. Construct berms at the entry into certain side channels to deflect waters into such channels as recommended by Drs. Brannon and Kaczynski.

c. Open the effluent ends of such side channels as recommended by Drs. Brannon and Kaczynski.

3. That the Watermaster shall continue to consult with the above-identified biologists so as to provide for the continuing monitoring of the conditions of the salmon redds and the flows in the Yakima river with the view by the Watermaster in exercise of his informed discretion to provide for reduction in flows of the river insofar as such reduction may be consistent with the protection of the spawning area.

4. That the parties to this matter, and the Watermaster, shall study and report to the Court prior to the 1981 irrigation water delivery season on means by which the needs of the Project water users can be met through more efficient or less extensive use

of Project waters or by modification of Project operations or facilities so as to have less impact on the fisheries resource, including the possibility of management of the various Project reservoirs and releases of water so as to provide for appropriate water flows during the spawning and hatching periods that may be practicable while at the same time providing water for irrigation purposes for users within the Project area.

DATED this 28 of November, 1980.

/s/ Justin L. Quackenbush
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert M. Sweeney
Assistant United States Attorney
Attorney for Watermaster
P. O. Box 1494
Spokane, WA 99210
Telephone: (509) 456-3811

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WASHINGTON

It appearing by the report of the Joint Congressional Commission, created under section twenty-three of the Indian Appropriation Act, approved June thirtieth, nineteen hundred and thirteen (Senate Document Number Three hundred and thirty-seven, Sixty-third Congress, second session), that the Indians of the Yakima Reservation in the State of Washington, have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled for the purposes of irrigation, having only been allowed one hundred and forty-seven cubic feet per second, the Secretary of the Interior is

hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred and forty-seven cubic feet per second heretofore allotted to said Indians, so that there shall be, during the low-water irrigation season, at least seven hundred and twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of Yakima River and adequate for the irrigation of forty acres of each Indian allotment; the apportionment of this water to be made under the direction of the Secretary of the Interior, and there is hereby authorized to be appropriated the sum of $635,000 to pay for said water to be covered

into the reclamation fund; the amount to be appropriated annually in installments upon estimates certified to Congress by the Secretary of the Treasury. One hundred thousand dollars is hereby appropriated to pay the first installment of the amount herein authorized to be expended, and the Secretary of the Interior is hereby directed to prepare and submit to Congress the most feasible and economical plan for the distribution of said water upon the lands of said Yakima Reservation, in connection with the present system and with a view to reimbursing the Government for any sum it may have expended or may expend for a complete irrigation system for said reservation.

For operation and maintenance of the irrigation system on lands allotted to Yakima Indians in Washington, $15,000, reimbursable in accordance with the provisions of the Act of March first, nineteen hundred and seven.

Act of August 1, 1914.
38 Stat. 582, 604

§666. Suits for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(CHAPTER 496)

AN ACT

July 1, 1940
(H.R. 3402)
(Public, No. 695)

To authorize the appropriation for payment of the cost of providing additional water for the Wapato Indian irrigation project, Washington.

Wapato Indian irrigation project, Washington.

Appropriation for additional water authorized.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $800,000, and credited to the reclamation fund, to defray the actual cost of furnishing an additional quantity of water annually of one hundred thousand acre-feet which is needed to provide adequate irrigation for forty acres each of the Indian allotments of the Yakima Reservation as contemplated by the Act of August 1, 1914, and set out in the terms of the agreement between the Bureau of Reclamation and the Office of Indian Affairs, approved by the Secretary of the Interior September 3, 1936, the same to be made available in amounts not to exceed $20,000 annually for forty years.

38 Stat. 582, 604.

Approved, July 1, 1940.

TREATY WITH THE YAKAMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquose, Wenatchapam, Klikatat, Klinquit, Kow-wa-say-ee, Li-ay-was, Skin-pah, Wishham, Shyiks, Oche-choetes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama", with Kamiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Cession of Lands

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Boundaries

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise: thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119°10′), which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; then in a true south course to the (952) forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence, in a southeasterly direction to the Snake River, at the mouth of the Tucannon River, separating the above confedered tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White banks," below the Priest's rapids; thence westerly to a lake called "La Lac", thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island", between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above confederated tribes and bands from the Walla Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between

the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Reservation

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Boundaries

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam river to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; *and thence up the Yakama River to the place of beginning.*

All of which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the Superintendent and agent. And the said confederated tribes

and bands agree to remove to, and settle upon, the same within one year after the ratificaton of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner of claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. And provided, That, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

Privileges Secured to Indians

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Payments by the United States

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year, for the next five years, six thousand dollars per year; and for the next five years, four thousand per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the

United States, who may from time to time determine at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

United States to Establish Schools

ARTICLE V. The United States further agrees to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers, to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accomodation of the said employees. The said buildings and establishments to be

maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said (954) confederated tribes and bands of Indians may select to be their head chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

Kamiakun Is The Head Chief

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the pai of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be charged upon the annuities, but shall be defrayed by the United States.

Reservation May Be Surveyed

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Annuities Not to Pay Debts of Individuals

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities.

Not to Make War But in Self Defense

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of differences between them and other Indians to the government of the United States or its agent for decision, and abide thereby, and if any of the said

Indians commit depredations on any other Indians within the territory of Washington and Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Wenatshapam Fishery Reserved

ARTICLE X. And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam fishery", which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

When Treaty to Take Effect

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(955) In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates to the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place on the day and year hereinbefore written.

ISAAC I. STEVENS, Governor and Superintendent
KAMIAKUN, his X mark
SKLOOM his X mark
OWHI, his X mark
TE-COLE-KUN,his X mark
La-HOOM, his X mark
ME-NI-NOCK, his X mark
ELIT PALMER, his X mark
WISH-OCH-KMPITS, his X mark
KOO-LAT-TOOS, his X mark
SHEE-AH-COTTE, his X mark
T[illegible]K-QUILLE, his X mark
KA-LOO-AS, his X mark
SCHA-NOO-A, his X mark
SLA-KISH, his X mark

Signed and sealed in presence of:

JAMES DOTY, Secretary of Treaties
MIE. CLES (JEAN CHARLES) PANDOSY, O.M.I.
WM. C. McKAY
W.H. TAPPAN, sub Indian agent, W.T.
C. CHIROUSE, O.M.I.
PATRICK McKENZIE, Interpreter
A.D. PAMBURN (PAMBRUN), Interpreter
JOEL PALMER, Supt. of Indian Affairs, O.T.
W.D. BIGLOW
A.D. PAMBURN (PAMBRUN), Interpreter

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the head chief, chiefs, headmen, and delegates of the Yakama, Palouse, and other confederated tribes and bands of Indians, occupying lands laying in Washington Territory, who, for the purpose of this treaty, are to be considered as one nation, under the name of "Yakama", with Kamiakun as its head chief, signed 9th June, 1855.

"Attest:

"ASBURY DICKENS, Secretary"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

(956) In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN

By the President:

LEWIS CASS, Secretary of State

STATEMENT TO THE COURT

Foreword

This action was instituted for the purpose of having the court determine whether the United States is obligated to deliver water without charge to land within the Sunnyside Valley Irrigation District situated in the Yakima Reclamation Project in excess of that which the Bureau of Reclamation had determined the landowners were entitled to under water contracts which they hold. The court was further requested to determine, assuming that it ruled in favor of the water users, as to the extent and nature of their rights so far as they relate to the rights of other users who are involved in the proceedings.

During the pendency of the instant case, the United States Circuit Court of Appeals

for the District of Columbia rendered its decision in the case of Fox V. Ickes, 137 F. (2d) 30, certiorari denied, 320 U. S. 792. The court in that case had before it for interpretation and construction the contracts of certain of the users within the Sunnyside Valley Irrigation District. The decision held in effect that the rights of the appellants in the proceeding, under their contracts, were to be determined on the basis of beneficial use and that the Bureau of Reclamation was without authority to increase the charges specified in the contracts of those users. That decision rendered moot the first proposition before the court in the case under consideration and left only the matter of the respective rights of the water users within the project undeter-

mined. Under the circumstances created by the foregoing decision it seemed very desirable to settle amicably the remaining phase of the controversy thus dispensing with extended litigation which would, as a result of cross complaints filed by certain of the defendants, necessitate an adjudication of the Yakima River. Accordingly, negotiations were undertaken which have resulted in the approval of a consent judgment by the attorneys for the litigants.

The proposed judgment in so far as it pertains to the parties before the court grants judicial recognition of those rights in the natural flow of the Yakima River which existed at the time the construction of the Yakima Project was undertaken; it likewise grants recognition of the rights of the users whose claims are based upon contracts with

the Bureau of Reclamation; it establishes a formula for proration, dependent upon the nature of the rights involved, during a period when the available supply of water is inadequate to meet the needs of all of the water users; it enjoins and restrains the parties before the court from contesting or otherwise interfering with the rights thereunder recognized; and it retains to the court jurisdiction so far as essential for proper administration and for the purpose of appointing a watermaster if in its discretion such appointment is necessary. The consent judgment does not in any way affect an adjudication as to the priority of the respective water users in the action in so far as they relate to other users of water from the Yakima River who are not litigants. Further, administrative acceptance of the

judgment by the interested agencies of the United States, the Bureau of Reclamation and the Office of Indian Affairs, has been expressed.

Summary of Facts and Legal Aspects with Respect to the Rights of the Parties to the Action.

The Yakima Reclamation Project, hereafter referred to as the Project, was originally initiated by the Bureau of Reclamation pursuant to the provisions of the Reclamation Law (43 U.S.C. 371), hereafter referred to as the Reclamation Law. The required investigation of the Project was undertaken in the year 1905 and its construction was started shortly after that date. For the purposes of administration the Project was divided into the Sunnyside Division composed of several irrigation districts, Tieton Division which is

administered by the Yakima-Tieton Irrigation District, Roza Division administered by the Roza Irrigation District, Kittitas Division administered by the Kittitas Reclamation District, and the Wapato Division which is situated within the Yakima Indian Reservation.

The normal flow of the Yakima River which constitutes the source of supply for the lands susceptible of irrigation within the Project is insufficient to meet the needs of all the water users during the months of July, August, and September. To remedy this situation the Bureau of Reclamation undertook the construction of storage reservoirs to impound the early spring run-off and flood water. The records kept by the Bureau of Reclamation disclose that the original plans for the development of the Yakima Project

contemplated the construction of all five of the divisions to which reference has been made. It further appears that the water for which the United States made its filing of intention to appropriate was for the Project as a whole.

At the time the construction work was initiated, it is still being continued in the Roza Division, lands within the Sunnyside Division in what is now part of the Sunnyside Valley Irrigation District, were being served by the Washington Irrigation Company. The United States acquired the irrigation system of that company subject to the interests of the water users served by the company who held contracts for specific quantities of water. The carrying capacity of the Washington Irrigation Company's canal was at the time of transfer to the United States

approximately 650 c.f.s. The rights of these users were based upon a filing made by a predecessor of the Washington Irrigation Company which expressed an intention of the appropriator to ultimately divert 1,000 c.f.s. of water. The transfer to the United States was completed prior to the time that the full 1,000 c.f.s. filed on by the Company was applied to beneficial use and while it was diverting about 815 c.f.s.

In addition to the direct flow right arising from the appropriation of the Washington Irrigation Company, or its predecessor, to which the lands within the Sunnyside Valley Irrigation District are entitled, the United States has in the past recognized an additional 25 c.f.s. known as the Prosser Falls Land & Power Company right.

Pursuant to its plan the Bureau of Reclamation enlarged and extended the canal which it had acquired from the Washington Irrigation Company to serve an additional area approximately as large as the acreage which receives water from the original system. The landowners within the area served by the extended and enlarged canal contracted with the Bureau of Reclamation pursuant to the Reclamation Law for their supply of water. These rights are referred to as public notice rights. Certain of the users within the area who had previously received their supply of water from the original system through contract with the Bureau of Reclamation acquired additional rights to supplement those for which they had already contracted. Such rights are referred to as supplemental

rights. Other users refused to contract with the Bureau of Reclamation basing their claims to water on their original contracts with the Washington Irrigation Company. There are, therefore, within the Sunnyside Valley Irrigation District four types of water rights: (a) those based on original contracts with the Washington Irrigation Company; (b) those referred to as supplemental rights; (c) the public notice lands; and (d) Warren Act Lands. Therefore, without including the public notice lands the users within the Sunnyside Valley Irrigation District have water rights aggregating approximately 640 c.f.s. which have in the past been recognized by the United States.

As part of the original development under the Reclamation Law the Bureau of Reclamation undertook the development of the Yakima-Tieton Division. The rights of the users within that Division are identical in character with the public notice rights in the Sunnyside Valley Irrigation District. The division in question has in the past diverted a maximum of about 330 c.f.s. Due to the limited carrying capacity of the system and the large proportionate acreage served by that system, in a normal year the water users receive a supply which is considered to be a minimum for crop production.

Subsequent to the development of the Sunnyside and Tieton Divisions the Bureau of Reclamation constructed additional storage reservoirs to serve the water users within

the Yakima Project. Pursuant to the Act of February 21, 1911, Ch. 141, 36 Stat. 925, 43 U.S.C. 523 et seq., hereafter referred to as the Warren Act, the Secretary of the Interior was authorized to contract for the disposition of stored water in excess of the needs of the project, preserving, however, "a first right to land and entrymen under the project." The quoted provision would in the instant case apply to water users in the Sunnyside Valley Irrigation District and the Tieton Division. Although never formally passed upon by the courts, the Warren Act appears to vest in the project users a priority over the Warren Act contractors. In the administration of its projects the Bureau of Reclamation has recognized such a priority between public notice rights and Warren Act rights.

The water which was developed pursuant to the Warren Act was sold under contract to the Kittitas Reclamation District, the Roza Irrigation District, to the irrigation districts within the Sunnyside Division which are set forth in paragraph 3 of the judgment other than the Sunnyside Valley Irrigation District, to those districts referred to in the judgment commencing at paragraph 8 through paragraph 16, exclusive of the Cascade Irrigation District, to the Indian Service and to certain other users not parties to the suit.

In most instances, the Warren Act contracts themselves specifically recognize the priority of the water users within the Sunnyside Valley Irrigation District who base their claims to water on contracts originally entered into with the Washington Irrigation

Company. Also the contracts, although somewhat ambiguous on the point, disclose language which might well have been intended to concede to the holders of public notice rights in the Sunnyside Valley Irrigation District and the Tieton Irrigation District a similar priority.

Further, with respect to the rights of the users in the Sunnyside Valley Irrigation District and the Tieton Division, there is no doubt that they had placed to a beneficial use quantities of water at least equal to that which they will receive pursuant to the proposed consent judgment which will not be subject to proration with Warren Act users.

In addition to the water rights to which reference is made above, there is involved in the litigation the right of the Yakima Indian Reservation to a supply of water from the

Yakima River. By the Act of August 1, 1914, Ch. 222, 38 Stat. 582, the Congress of the United States claimed for the tribe in question 720 c.f.s. of water in the low water flow of the Yakima River. Over and above the 720 c.f.s. the Yakima Reservation receives 350,000 acre feet of water pursuant to agreements entered into between the Bureau of Reclamation and the Office of Indian Affairs. These later rights are derived from water made available as the result of the furnishing of storage capacity under the Warren Act. In the proposed consent judgment, the rights last mentioned to which the Indians are entitled are considered in the same light and are subject to the same limitations as other Warren Act rights.

Over and above the foregoing rights there is another class of claims to water

from the Yakima River which are affected by the judgment. They, like the claims of the Washington Irrigation Company and the Prosser Falls Land & Power Company claim, were initiated prior to the time that development of the Yakima Project was undertaken. In most instances these claimants by instruments called limiting agreements, executed in consideration of the construction of the project by the United States, defined the maximum quantities which those users would divert from the source of supply under their appropriation. The judgment recognizes these claims and also the rights of other claimants on the river who, although having refused to sign limiting agreements, have perfected rights of which the Bureau of Reclamation has always taken cognizance.

A factor important in attaining the settlement contained in the proposed judgment was the willingness of the Kittitas Reclamation District to release back to the United States certain of the water which it presently holds under contract for sale to other districts within the Project. The interest or responsibility of the United States, however, is not affected by transfer of the rights as it will merely look to the purchasers for the payments which the Kittitas District was formerly obligated to make.

The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of

Reclamation or a watermaster if one is appointed may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project. Briefly the consent judgment as drafted fixes the rights of the parties as among themselves as follows:

(a) There is recognized in the Sunnyside Valley Irrigation District a right to 725 c.f.s. of water which will not be subject to proration with the Warren Act users in a period of shortage. Of this quantity 50 c.f.s. may be measureable return flow from the Roza Division thereby affecting what may in the future be an appreciable reduction of that district's claim to water from storage and natural flow. It has been estimated by the Bureau of Reclamation that

the recognition in the Sunnyside Valley Irrigation District of a right to 725 c.f.s. undiminished in a period of inadequate supply will insure that district of a quantity of water within 6% of normal during a period of one-third shortage.

(b) There is recognized in the proposed consent judgment the rights of the Tieton Division to 250 c.f.s. which has the same status as the rights of the Sunnyside Valley Irrigation District which are exempt from proration. This is a reduction of 80 c.f.s. from the maximum quantity which that division has in the past diverted. If the judgment is entered as drafted in a period of one-third shortage it has been estimated by the Bureau of Reclamation that the division in question would experience a reduction from normal of approximately 10%. However, there has been

transferred 18,000 acre feet from the Kittitas Reclamation District to the Tieton Division. It is probable therefore that the Tieton Division will not be forced to experience any reduction below normal supply in a period of extreme shortage.

(c) The Indian Service, for reasons above expressed, will receive an undiminished right to 720 c.f.s. The comments made with respect to the Warren Act users hereafter set forth will apply to the balance of the rights to which the Indian Service is entitled under the judgment.

(d) All of the rights to direct flow which have previously been recognized by the United States other than those specified are likewise exempt in full from proration by the judgment in so far as Warren Act users are concerned.

(e) The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs (a), (b), (c), and (d). In a period of shortage these users must ultimately accept a proportionate reduction based on a formula set out in the judgment. The rights of the Sunnyside Valley Irrigation District and the Tieton Division, except as to the quantities exempt from proration, will likewise be subject to reduction based on the same formula.

The parties to the suit are, by the judgment, enjoined from asserting claims against each other or their successors and assigns in so far as the water rights covered by the judgment are concerned. The judgment does not, however, affect the rights of such

parties or users who are not within the jurisdiction of the court in the present proceeding. In addition, provision is made for the appointment by the court, if in its discretion such appointment is necessary, of a watermaster to be vested with such authority as the court deems appropriate in the administration of the Yakima Project. The court further retains jurisdiction over matters arising in the administration of the rights of the parties affected by the judgment and for the purpose of interpreting the provisions set forth in the judgment.

/s/ Edwin M. Connelly,
U.S. Attorney

/s/ William H. Veeder,
Department of Justice

/s/ D. G. Tyree,
Asst. Regional Counsel
Bureau of Reclamation

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

KITTITAS RECLAMATION DISTRICT; SELAH & MOXEE IRRIGATION DISTRICT; and UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SUNNYSIDE VALLEY IRRIGATION DISTRICT; CHRISTINA MARIA EDER; LUIS LUCCOLINI and EUFFEMIA LUCCOLINI, his wife; MAZINE Z. FOX and JOSIE R. FOX, his wife; ELMER A. BACON and ARTIE BACON, his wife; PHILIP LOUIS PARKS and OLLIE D. PARKS, his wife; ROZA IRRIGATION DISTRICT; YAKIMA RESERVATION IRRIGATION DISTRICT; YAKIMA-TIETON IRRIGATION DISTRICT; TIETON WATER USERS' ASSOCIATION; GRANDVIEW IRRIGATION DISTRICT; GRANGER IRRIGATION DISTRICT; PROSSER IRRIGATION DISTRICT; SNIPES MOUNTAIN IRRIGATION DISTRICT; SUNNYSIDE IRRIGATION DISTRICT; ZILLAH IRRIGATION DIS-

NO. 21

J U D G M E N T

TRICT, BROADWAY IRRIGA-)
TION COMPANY, MOXEE DITCH)
COMPANY SUB-A; NACHES-)
SELAH IRRIGATION DISTRICT)
TERRACE HEIGHTS IRRIGA-)
TION DISTRICT; UNION GAP)
IRRIGATION DISTRICT; WEST)
SIDE IRRIGATING COMPANY;)
YAKIMA VALLEY CANAL)
COMPANY; OUTLOOK IRRIGA-)
TION DISTRICT; and)
CASCADE IRRIGATION)
DISTRICT;)
)
Defendants.)
)

The above-entitled cause having come on for hearing and it appearing to the Court that the plaintiffs and the defendants have concluded and settled all issues in this cause; that the parties hereto have joined in a Motion for Entry of Judgment; that the provisions hereafter set forth in this judgment constitute the agreement of the parties with respect to such issues; and that upon consideration of the records herein and

the Motion for Entry of Judgment the Court finds that the Motion for Entry of Judgment should be granted:

NOW, THEREFORE, it is ordered, adjudged and decreed as follows:

1. The defendants, Christina Mariea Eder, Luis Luccolini and Euffemia Luccolini, his wife, Mazine Z. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Philip Louis Parks and Ollie D. Parks, his wife, and the Yakima Reservation Irrigation District are dismissed as defendants in this cause.

2. The obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the

lands within the Wapato Indian Irrigation Project, are as set forth hereafter in this judgment.

3. SUNNYSIDE DIVISION.--The United States shall divert each year into the Sunnyside Main Canal, hereafter referred to as the Sunnyside Canal, to supply the water rights of the parties entitled to receive water from the Sunnyside Canal in the Sunnyside Division, a total quantity of 449,520 acre-feet of water on the following monthly schedule:

	Average Rate of Diversion in Cubic Feet per Second	Diversion in Acre-Feet
April	895	53,230
May	1,209	74,340
June	1,280	76,150
July	1,290	79,300
August	1,290	79,300
September	995	59,190
October	456	28,010
		449,520

The foregoing schedule of diversions shall be increased commensurate with the quantities of water to be acquired from the United States by the Grandview, Outlook, Granger, Prosser and Zillah Irrigation Districts, as set forth in paragraph 6 of this judgment: Provided, however, that the water acquired by these Districts shall not be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

(a) SUNNYSIDE VALLEY IRRIGATION DISTRICT.--The United States shall divert annually into the Sunnyside Canal a total quantity of 340,944 acre-feet of water to supply the water rights of said District and the water users within the District, including water users who have no water right applications or contracts with the United States, on the following schedule:

	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
April	658	39,159
May	901	55,409
June	960	57,089
July	973	59,798
August	983	60,439
September	753	44,780
October	612	24,270
		340,944

(b) PROSSER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 7,347 acre-feet of water annually,

which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, and the United States or its successor in the operation of the said Canal shall deliver pursuant to the contract dated December 1, 1917, with the Prosser Irrigation District, at Mile 56.05 and Mile 59.32 of the Sunnyside Canal in an amount not exceeding the following schedule:

Month	Acre-feet Per Acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery during any one month shall not exceed the following schedule:

April	14	second-feet
May	16	" "
June	21	" "
July	21	" "
August	21	" "
September	14	" "

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found

available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the said Canal, in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, shall deliver to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with

the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The foregoing quantities of water for the Prosser Irrigation District shall be increased 2,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(c) SNIPES MOUNTAIN IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 9,247 acre-feet of water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for by contracts between the United States and the Snipes Mountain Irrigation District dated November 16, 1914, and July 11, 1931. There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal a total of 5,265 acre-feet, pursuant to the contract dated November 16, 1914, between the United States and the Snipes Mountain Irrigation District, at the following points on the Snipes Mountain Canal: (a) at Mile 9.05, (b) at Mile 10.20, and (c) near Mile 6.42. The

annual irrigation season shall be from April to September, inclusive; the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the following schedule, shall be 17.7 cubic feet per second and the monthly supply of water shall not exceed the following monthly scheduled of deliveries:

Month	Acre-feet Total of Contract
April	685
May	840
June	1050
July	1055
August	950
September	685
Total	5265

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found

available by the officer in charge of the administration of the water supply for the Yakima project.

In addition to the water supply provided for in said contract of November 16, 1914, the United States or its successors in the operation of the Sunnyside Canal pursuant to a contract dated July 11, 1931, with the District, shall deliver annually a total of 2874 acre-feet at the following points: (a) Mile 9.05 of the Snipes Mountain Canal; (b) at Mile 1.15 of the West Branch of the Snipes Mountain Canal; and (c) near Mile 6.42 of the Snipes Mountain Canal. The annual irrigation season shall be from April 1 to September 30, inclusive, and the mean monthly supply of water to be furnished under said contract shall not be in excess of the following

schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	287.40
May	16	459.84
June	19	546.06
July	21	603.54
August	20	574.80
September	14	402.36
Totals	100	2,874.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(d) GRANDVIEW IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 14,588 acre-feet of water annually which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for in

contracts between the United States and Grandview Irrigation District dated October 4, 1916, and February 21, 1933. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at Mile 50.35 of the Sunnyside Canal and at Mile 2.87 of the Rocky Ford branch canal of the said Sunnyside Canal in an amount not exceeding the following monthly schedule:

Month	Acre-feet per acre
April	.36
May	.45
June	.52
July	.53
August	.53
September	.36
Total	2.75

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during

October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the above schedule, shall be 34 c.f.s.

There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per

acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The United States or its successor in the operation of the Sunnyside Canal shall also deliver each year, in addition to the water supply provided for in the foregoing contract of August 4, 1916, pursuant to its contract of February 21, 1933, with the District, 1970 acre-feet of water at Mile 50.35 of the Sunnyside Canal. The annual irrigation season for the delivery of water

shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be furnished under said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	9	184
May	26	501
June	8	151
July	9	186
August	9	186
September	18	362
October	21	400
Total	100	1,970

The foregoing quantities of water for the Grandview Irrigation District shall be increased 3,000 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of

water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(e) ZILLAH IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 362 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated September 29, 1922, as amended by the contract of June 22, 1931, between the United States and the Zillah Irrigation District. The United States or its successor in the operation of

the Sunnyside Canal shall deliver water pursuant to the said contracts at turnouts numbered 15.47 and 15.62 and 16.82 on the Sunnyside Canal and the mean monthly supply of water shall not exceed the following schedule of percentages of the total diversion:

Month	Per Cent
April	9
May	15
June	19
July	19
August	19
September	13
October	6
Total	100

The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year.

The foregoing quantities of water for the Zillah Irrigation District shall be increased 200 acre-feet upon the execution of

a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(f) GRANGER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 5,454 acre-feet of water annually which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated November 20,

1922, between the United States and the Granger Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract during the irrigation season from April 1 to September 30, inclusive, at the head of the pressure pipe at Mile 23 of the Sunnyside Canal, said water to be delivered to the District in amounts not to exceed the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The maximum rate of flow which the District may demand during any one month shall be as follows:

Month	Rate of Flow
April	10.9 c.f.s.
May	12.6 "
June	15.2 "
July	15.2 "
August	15.2 "
September	10.9 "

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing quantity of water for the Granger Irrigation District shall be increased 1,800 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of

water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(g) OUTLOOK IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 17,855 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amount of water provided for in the contract between the United States and Outlook Irrigation District dated November 23, 1914, as amended by the contracts of August 1, 1916, and July 1, 1919, and the contract dated December 20,

1932. The United States or its successor in the operation of the Sunnyside Canal pursuant to the said contract of November 23, 1914, as amended, shall deliver 14,530 acre-feet at Mile 30.25 on the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the maximum rate of flow which the District may demand during any one month, based on the following schedule, shall not exceed 46 c.f.s. and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	1890
May	2380
June	2730
July	2820
August	2820
September	1890
Total	14,530

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the Sunnyside Canal, pursuant to the contract dated December 20, 1932, with the District, in addition to the water supply provided for in said contract of November 23, 1914, as amended, shall deliver

annually 1185 acre-feet at the headworks of the District in the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be delivered under the terms of said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	6	70
May	11	130
June	16	185
July	15	180
August	15	180
September	12	145
October	25	295
Totals	100	1,185

The foregoing quantities of water for the Outlook Irrigation District shall be increased 4,500 acre-feet upon the execution

of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(h) SUNNYSIDE IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 21,044 acre-feet of water, which quantity of water includes estimated losses between the point of diversion and the point of delivery, to supply the amounts of water provided for in a contract dated October 6,

1914, between the United States and the Sunnyside Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract to the headworks of the District, which are located on the West line of Section thirteen (13), Township nine (9) North, Range twenty-five (25) East, W.M., eleven hundred fifty-four and five-tenths (1154.5) feet North of the Southwest corner of said section, and the point at which said Canal enters said District. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	2410
May	2960
June	3700

July	3690
August	3350
September	2410
Total	18,520

The maximum rate of flow which the District may demand during any one month, based on the above schedule, shall not exceed 60 c.f.s. Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(i) Nothing in this decree shall preclude the Prosser Irrigation District,

Snipes Mountain Irrigation District, Grandview Irrigation District, Zillah Irrigation District, Granger Irrigation District, Outlook Irrigation District or Sunnyside Irrigation District from the permissive use of surplus water in the Sunnyside Canal if available in the month of October, to the same extent and under the same conditions as prior to the entry of this judgment.

4. WAPATO INDIAN IRRIGATION PROJECT.--The United States shall deliver, pursuant to the Act of August 1, 1914, 38 Stat. 582, in perpetuity for lands within the Yakima Indian Reservation, hereinafter referred to as the Wapato Indian Irrigation Project, at the northern boundary thereof, a total of 720 cubic feet of water per second.

The United States shall, pursuant to the agreement dated September 21, 1943, between the Bureau of Reclamation and the Office of Indian Affairs, which superseded the agreement of March 9, 1921, as amended by an agreement dated September 3, 1936, divert from the Yakima River 250,000 acre-feet of water each year for the lands of the Wapato Indian Irrigation Project, such water to be measured at the diversion works of the Wapato Indian Irrigation Project. The irrigation season for the delivery of the 250,000 acre-feet of water shall be from April 1 to September 30, each year, except as the season may be by the United States extended to include the month of October. The diversion of the said 250,000 acre-feet of water shall be in

accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing basic schedule, as provided in the agreement of September 21, 1943, may be revised for a particular irrigation season or part of a season by agreement to be entered into prior to or during the irrigation season affected, between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs, to permit an interchange of quantities of water available at such time as storage is being released

for use below Union gap during the months of June, July, August and September and to permit the use of part of such available quantities during the month of October. The revision in such schedule shall be effective only as to the months of June, July, August and September in the same irrigation season as the making of the agreement and only from the date of storage release.

The United States shall divert each year in addition to the water supply hereinabove set forth for the Wapato Indian Irrigation Project, in accordance with the agreement dated September 3, 1936, between the Office of Indian Affairs and the Bureau of Reclamation, and the Act of July 1, 1940, 54 Stat. 707, 100,000 acre-feet of water from the Yakima River, to be measured at the diversion works of the Wapato Indian

Irrigation Project. The annual irrigation season for the delivery of such water shall be from April 1 to September 30 each year and the diversion of said 100,000 acre-feet shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing schedule, as provided in the agreement of September 3, 1936, may be revised by agreement between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs to permit, subsequent to the date of storage release, for use below Union

Gap in the months of June, July, August and September, the use of water interchangeably during said months in an amount not to exceed 70,000 acre feet.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said agreements.

5. TIETON DIVISION (Tieton Water Users' Association and Yakima-Tieton Irrigation District).--The United States shall divert annually into the Tieton Main Canal, to supply the water rights of parties entitled to receive water from the said Canal, for use on the lands within the boundaries of the Yakima-Tieton Irrigation District, 96,000 acre-feet on the following monthly schedule:

Month	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
May	293	18,000
June	336	20,000
July	325	20,000
August	325	20,000
September	302	18,000
		96,000

The foregoing schedule of diversions shall be increased commensurate with the quantity of water to be acquired from the United States by the Yakima-Tieton Irrigation District as provided in paragraph 6 of this judgment: Provided, however, that the water acquired by that District shall not be diverted into the Tieton Main Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

6. KITTITAS DIVISION (Kittitas Reclamation District).--The United States

shall deliver to the Kittitas Reclamation District, pursuant to a contract dated February 16, 1921, as amended by the contracts of November 1, 1930, and June 4, 1940, and January 10, 1945, between the United States and the Kittitas Reclamation District, at a point opposite the headworks of the District constructed on the Yakima River in Section eleven (11), Township twenty (20) North, Range thirteen (13) East, W.M., during each irrigation season, 342,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 20 to October 15, inclusive, and the mean monthly supply of water shall not exceed the following

schedule of percentages of the total annual diversion as hereinafter set forth:

During	April	2%
"	May	17%
"	June	21%
"	July	21%
"	August	20%
"	September	13%
"	October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

The Kittitas Reclamation District has released, pursuant to the foregoing contract, as amended, to the United States 20,000 acre-feet of water in the months of April, May and June, and 10,000 acre-feet of water during the months of July, August, September and October from its water supply provided for in said contract, as amended, such water to be sold by the United States to the

following irrigation districts in the amounts set opposite the respective districts:

Yakima-Tieton Irrigation District	18,000	acre-feet
Granger Irrigation District	1,800	" "
Outlook Irrigation District	4,500	" "
Grandview Irrigation District	3,000	" "
Prosser Irrigation District	2,500	" "
Zillah Irrigation District	200	" "

7. ROZA DIVISION (Roza Irrigation District).--The United States shall deliver to the District, pursuant to a contract dated July 8, 1921, between the United States and the Yakima-Benton Irrigation District (now Roza Irrigation District), as amended by the contract of April 15, 1935, at a point opposite the headworks of the District located in Section twenty-eight (28), Township fifteen (15) North, Range nineteen (19) East, W.M., 375,000 acre-feet of water measured at or near said diversion works for

use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive; and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth.

During	April	10%
"	May	15%
"	June	19%
"	July	19%
"	August	19%
"	September	12%
"	October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

8. SELAH & MOXEE IRRIGATION DISTRICT.--The predecessor in interest of the Selah & Moxee Irrigation District, in

accordance with the instrument known as a limiting agreement, executed January 25, 1906, recorded March 12, 1906, in Volume 41 of Deeds at page 418 of the records of Yakima County, Washington, limited its right in the natural flow of the Yakima River as follows:

April to August, inclusive	September	October
78 c.f.s.	60 c.f.s.	40 c.f.s.

Such rights have been recognized by the United States in a contract dated November 15, 1920, between the District and the United States.

The United States shall deliver to the District, in accordance with the foregoing contract, 3,000 acre-feet of water at a point opposite the headworks of the District on the Yakima River which headworks are located in Section seventeen (17), Township fourteen

(14) North, Range nineteen (19) East. Willamette Meridian, the water to be delivered as nearly as practicable in compliance with the orders of the District.

The United States shall deliver annually to the District, pursuant to its contract dated April 30, 1931, with the District, in addition to the water supply provided for in said contract of November 15, 1920, 1757 acre-feet of water at the head of the Selah-Moxee ditch. The annual irrigation season for the delivery of water under said contract dated April 30, 1931, shall be from April 1 to September 30, inclusive, each year and the mean monthly supply of water to be delivered under said contract of April 30, 1931, shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	175.70
May	16	281.12
June	19	333.83
July	21	368.97
August	20	351.40
September	14	245.98
Totals	100	1,757.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts. The foregoing obligation of the United States to deliver water also is subject to an agreement dated October 27, 1939, between the Selah & Moxee Irrigation District and Terrace Heights Irrigation District, under the terms of which the Selah & Moxee Irrigation District transferred for the use of lands in the Terrace Heights Irrigation District one-tenth of the foregoing amounts. By reason thereof, the

obligation of the United States to deliver the foregoing amounts is reduced by one-tenth.

9. WEST SIDE IRRIGATING COMPANY.--The West Side Irrigating Company, in accordance with the instrument which it executed October 21, 1905, known as a limiting agreement, which instrument was recorded on the 14th day of March, 1906 in Book 2 of Water Rights at page 315 of the records of Kittitas County, Washington, limited its water rights in the natural flow of the Yakima River to 80 c.f.s. during the months of April to September, inclusive, and 34 c.f.s. during the month of October of each year. These rights were recognized by the United States in its contract of August 1, 1922, with said Company.

The United States, in accordance with the said contract of August 1, 1922, in addition, shall deliver to the Company 25 c.f.s. from April 20 to September 30, inclusive, provided that the total quantity of such water be limited to 8,200 acre-feet. The water shall be measured at a point in the canal known as the millpond wasteway and flume, located in the Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Three (3), Township Eighteen (18) North, Range Seventeen (17) East of the Willamette Meridian.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

10. UNION GAP IRRIGATION DISTRICT.--The Union Gap Irrigation Company and the Fowler

Ditch Company, predecessor in interest of the Union Gap Irrigation District, to which reference is hereafter made, in accordance with the instrument which they executed on November 25, 1905, known as a limiting agreement, limited their water rights in the natural flow of the Yakima River as follows:

April to August, inclusive,	23	c.f.s.
September	16	"
October	12	"

These rights were recognized by the United States in its contract of May 23, 1906, with the Union Gap Irrigation Company.

The United States shall deliver, pursuant to the said contract of May 23, 1906, during the months from April to August, both inclusive, 28 c.f.s., during the month of September, 19 c.f.s., and during the month of October, 14 c.f.s. During the months from

November to March both inclusive the United States in accordance with the contract shall deliver a reasonable amount of water for stock purposes. All water covered by the contract of May 23, 1906, shall be diverted and measured at the intake of the Fowler Ditch.

In addition, the United States shall deliver to the Union Gap Irrigation District, successor in interest of the Fowler Ditch Company, pursuant to its contract with the District dated March 2, 1915, 4222 acre-feet of water at the headworks of the District located approximately 950 feet west and 650 feet north of the southeast corner of Section seven (7), Township thirteen (13) North Range nineteen (19) East, W.M. The annual irrigation season for the delivery of water under the contract shall be from April 1 to

October 31, inclusive, and the monthly supply of water furnished under said contract of March 2, 1915, shall not exceed the following schedule of deliveries:

During	April	534	acre-feet
"	May	675	" "
"	June	712	" "
"	July	737	" "
"	August	797	" "
"	September	534	" "
"	October	233	" "
		4222	

The maximum flow for any one month to be 13 c.f.s.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

11. BROADWAY IRRIGATION COMPANY.--The United States shall deliver to the Broadway Irrigation Company 700 acre-feet from the natural flow water available in Wide Hollow

Creek pursuant to its contract with the Company dated December 1, 1921, and shall deliver said water at a point opposite the Company's headworks located 600 feet west of the east quarter corner of Section thirty-five (35), Township thirteen (13) North, Range eighteen (18) East of the W.M. The annual irrigation season shall be from April 1 to October 31, inclusive, and the monthly supply of water shall not exceed the following schedule of percentage of the total annual diversion as hereinafter set forth:

During	April	10%	-	70	acre-feet
"	May	15	-	105	" "
"	June	19	-	133	" "
"	July	19	-	133	" "
"	August	19	-	133	" "
"	September	12	-	84	" "
"	October	6	-	42	" "
	Total			700	

The quantity of water to be delivered shall be limited to that which is available in Wide Hollow Creek.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

12. CASCADE IRRIGATION DISTRICT.--The Cascade Canal Company, in accordance with an instrument known as a limiting agreement which it executed December 12, 1906, limited its rights in the natural flow of the Yakima River to 150 c.f.s. from the period from March 15, to July 20; from July 20 to October 15 such rights are limited in accordance with the storage contract referred to in the succeeding paragraph, and from October 15 to March 15 to 30 c.f.s. for stock purposes. Such rights have been recognized by the

United States in a contract dated December 12, 1906, between the District and the United States. All of the rights of the Cascade Canal Company were transferred to and are now owned by the Cascade Irrigation District.

The United States shall deliver to the Irrigation District pursuant to the contract of December 12, 1906, a total of 16,800 acre-feet of water between July 20 and October 15 of each year, delivery of water to be at points higher on the river than the headgate of said District located in the Northwest Quarter (NW¼) of Section twenty-eight (28), Township nineteen (19) North, Range seventeen (17) East, W.M., and the water to be measured at a point on said canal below and within 100 feet of a certain wasteway from said canal in Section thirty-four (34), Township nineteen (19)

North, Range seventeen (17) East, W.M. At no time under said contract shall the District require a flow in excess of 150 c.f.s. of time.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

13. TERRACE HEIGHTS IRRIGATION DISTRICT.--The United States shall, in accordance with its contract of February 10, 1940, with the Terrace Heights Irrigation District, which supplemented the contract of March 24, 1931, deliver annually a maximum of 3,259.5 acre-feet of water per annum, measured at or near the points of diversion in the main Roza canal, the maximum net deliveries at the points of delivery, after the deduction of

10% for evaporation and seepage losses, to be made in accordance with the following monthly schedule:

Month	Total Acre-feet	Second Feet
April	416.1	6.99
May	483.8	7.87
June	501.5	8.43
July	531.2	8.64
August	521.6	8.48
September	357.7	6.01
October	121.7	1.98
Total	2,933.6	

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contract.

14. MOXEE DITCH COMPANY, SUB-A.--The Moxee Company, in accordance with an instrument known as a limiting agreement which it executed October 24, 1905, limited its rights to divert water from the Yakima River as follows:

April to August inclusive	September	October
38 c.f.s.	29 c.f.s.	22 c.f.s.

The rights so limited were later divided between the Moxee Ditch Company and the Hubbard Ditch company as follows:

Moxee Ditch Company

April to August, inclusive,	11	c.f.s.
September	8.4	"
October	6.4	"

Hubbard Ditch Company

April to August, inclusive,	27	c.f.s.
September	20.6	"
October	15.6	"

Such rights have been recognized by the United States in its contract with the Moxee Ditch Company, Sub-A, dated June 27, 1929.

The United States shall deliver annually to the Moxee Ditch Company, Sub-A, 959.4 acre-feet of water at the head of the Moxee or Hubbard Ditch in accordance with said

contract of June 27, 1929. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year and the mean monthly supply of water furnished under the contract shall not exceed the following schedule of percentages of the total annual diversion:

April	9%
May	15
June	19
July	19
August	19
September	13
October	6

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

15. NACHES-SELAH IRRIGATION DISTRICT.--The predecessor in interest of the Naches-Selah Irrigation District, in accordance with the instrument executed

December 21, 1905, known as a limiting agreement, limited its rights in the Yakima River during the months of April to September, inclusive, to 105 c.f.s., and 100 c.f.s. during the month of October, said limiting agreement having been recorded March 12, 1906, in Vol. 41 of Deeds, page 420, Records of Yakima County, Washington. Subsequent to execution of the limiting agreement, the predecessor in interest of the District acquired through conveyances certain additional water, and the United States by a contract dated April 6, 1920, with the Naches-Selah Irrigation District recognized in the District the following rights or such part thereof as may be available in the natural flow of the Yakima River:

	April to August	September	October
Limiting agreement water	105 cfs	105 cfs	100 cfs
Additional water	11.77 "	8.51 "	6.91 "
Totals	116.77 "	113.51 "	106.91 "

In addition to the above mentioned water the Naches-Selah Irrigation District subsequent to the execution of said agreements purchased and acquired an additional water right of 2 c.f.s., which has been diverted through the canal of said District and used upon lands therein.

The United States shall deliver annually to the District in accordance with its contract of April 6, 1920, from April 1 to August 31, inclusive, a supply of "supplemental water" to be delivered in

amounts not to exceed the following schedule of deliveries:

During	April	674	acre-feet
"	May	811	" "
"	June	901	" "
"	July	1050	" "
"	August	1050	" "
	Total	4486	" "

The maximum rate of flow for such supplemental water shall not exceed 17.1 c.f.s. and shall be delivered at a point opposite the headworks of the District on the Naches River in the Southwest Quarter (SW¼), Northwest Quarter (NW¼), Section thirty-five (35), Township fifteen (15) North, Range sixteen (16) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

16. YAKIMA VALLEY CANAL COMPANY.--The Yakima Valley Canal Company, in accordance with the instrument which it executed January 8, 1906, known as a limiting agreement, which was recorded March 12, 1906, in Vol. 41 of Deeds at page 397, Yakima County, Washington, limited its water rights to 62½ c.f.s. during the months of April to August, inclusive, 40 c.f.s. during the month of September, and 30 c.f.s. during the month of October of each year. Subsequent to the limiting agreement the Company acquired certain additional water rights, purported to be 1½ c.f.s., by a conveyance recorded in Vol. 146 of Deeds, page 566 of the Yakima County records.

The United States by its contract with the Yakima Valley Canal Company, dated June 2, 1920, recognized in the Company the following rights or such part thereof as may

be available from the natural flow of the Yakima River:

	April to August (both inclusive)	September	October
Limiting agreement water	62.5 cfs	40 cfs	30 cfs
Transferred water	1.5 "	1.5 "	0.75 "
	64 cfs	41.5 cfs	30.75 cfs

The United States shall deliver to the Company each year, in accordance with the contract of June 2, 1920, 4300 acre-feet of storage water. Delivery of such water shall be made at a point opposite the headworks of the Company on the Naches River in the Northwest Quarter (NW¼) of Section twenty-five (25), Township fourteen (14) North, Range seventeen (17) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contracts.

17. The United States shall continue to divert available flood water from the Yakima River and its tributaries in accordance with its practice prior to the entry of this judgment, and the quantities of such water which the parties to this judgment are entitled to receive shall be over and above the schedules of diversion hereinabove set forth. Within the meaning of this judgment, flood water is available for such diversions when, as determined by the Yakima Project Superintendent, there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for proper river regulation, including in said amount the amount necessary to protect fish life in the

river below said dam. The determinations by the Yakima Project Superintendent as to whether flood water is available for such diversions shall be binding upon the parties hereto, subject to review by the court. The United States, or its successor in the operation of the Sunnyside Canal, shall deliver at the points of delivery in said canal, as above set forth, the pro rata shares of the Sunnyside Valley, Prosser, Snipes Mountain, Grandview, Zillah, Granger, Outlook and Sunnyside Irrigation Districts of said flood waters.

18. The parties to this judgment, except as provided in paragraph 19 hereof, shall have equal rights with respect to the priority in the delivery of the quantities of water to which they are entitled under the preceding paragraphs of this judgment. If

for any cause it is impossible to supply fully those quantities, the water subject to proration to which each party to this judgment is entitled shall be proportionately diminished. The pro rata share of that water which each of the parties to this judgment shall receive during a period of insufficient supply shall be an amount in the same proportion to the quantity of water subject to proration that each of the parties is entitled to under this judgment as the total water supply available, as hereinafter defined, less the summation of the rights recognized in paragraph 19 bears to the aggregate of the following quantities of water: Those quantities of water provided for in this judgment which are subject to proration, and those quantities subject to proration which the United States has

contracted to deliver to water users not parties to this judgment; provided, however, that during the period of development of the Roza Division the amount of water to be included for that Division in the foregoing aggregate shall be the amount diverted for the irrigated lands of that Division in a normal year, plus estimated losses from the points of diversion to the place of delivery, rather than the amount recognized in paragraph 7 of this judgment; and provided further that, during the period of development of the Roza Division, in computing the pro rata share of water which the Roza Division will be entitled to receive in a period of insufficient supply there will be used that quantity of water diverted for the Roza Division in a normal year plus estimated losses, rather than the quantity

recognized for that Division in paragraph 7 of this judgment.

For the purpose of this judgment "total water supply available" is defined as that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

19. The following amounts of water are excepted from the preceding paragraph with respect to proration, and the summation of said amounts shall be deducted from the

"total water supply available" subject to proration:

(1) 720 c.f.s. of water for the use on lands within the Wapato Indian Irrigation Project provided for by the Act of August 1, 1914 (38 Stat. 604), which amount shall constitute the limit of the water rights of the said Project not subject to proration.

(2) 250 c.f.s. of water during the months of May, June, July, August, and September of the amount heretofore recognized in this judgment for the use on lands within the Tieton Division, which amount shall constitute the limit of the water rights of said Division not subject to proration.

(3) 700 c.f.s. of water during the months of April, May, June, July, August, September, and the first 20 days of October,

of the amount heretofore recognized in this judgment for the use on lands within the Sunnyside Valley Irrigation District, which amount shall constitute the limit of the water rights of said District not subject to proration, except as to those lands within the Sunnyside Valley Irrigation District which are covered by sub-paragraph 6 hereof. Provided, however, that not exceeding 50 c.f.s. of said amount may be measured daily by the Bureau of Reclamation from return flow of the Roza Division into the Sunnyside Canal. The amounts so excepted from proration shall be for the benefit of all lands within the Sunnyside Valley Irrigation District, subject to classification of lands by the Board of Directors of the District.

(4) 35 c.f.s. of water for the use on the so-called Konnewock lands, served from

the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(5) 26 c.f.s. of water, for the use on Piety Flat lands, in accordance with the contract of May 1, 1914, between the United States and Piety Flat Ditch Company, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(6) 25 c.f.s. of water, in accordance with the contract of September 24, 1910, between the United States and Prosser Falls Land and Power Company, served from Sunnyside Canal, which is the limit of this right not subject to proration.

(7) 5 c.f.s. of water in accordance with the contract between the

United States and the Town of Prosser, dated May 3, 1911, served from the Sunnyside Canal, which is the limit of this right not subject to proration.

In addition to the amounts herein set forth which shall be excepted from paragraph 18 with respect to proration, there also shall be excepted from paragraph 18 the rights of Cascade Irrigation District which are recognized in paragraph 12, and the amounts claimed by other water users of natural flow rights from the Yakima River and its tributaries, which have heretofore been recognized by the United States whether or not such users are parties to this action, and the summation of said amounts shall also be deducted from the total water supply available subject to proration. Exception from proration of such amounts specified in

the preceding sentence from the total water supply available does not constitute a determination of the quantum or priority of such claimed rights, and is without prejduice to any of the parties to this action.

20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment and the lands within the Wapato Indian Irrigation Project. Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to or from interfering with any of the rights to the use or the delivery of those quantities of water which

are recognized in this judgment. This judgment shall not, however, be construed as limiting or in any way interfering with the transfer or legal succession of any of those rights. The rights of any claimants to water of the Yakima River or watershed who are not parties to this cause shall in no way be prejudiced or affected by this judgment nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants. This judgment shall be binding upon and inure to the benefit of the grantees, assigns or successors of the parties hereto. The several parties to this suit shall pay their own costs in this action.

The Court, in its discretion, may appoint a watermaster, who shall be vested

with such authority as the Court deems appropriate in the administration of the water rights, subject to the provisions of this judgment. This Court shall retain jurisdiction over matters of interpretation of this judgment and matters relating to the administration thereof.

Done in open court this 31 day of January, 1945.

/s/ L. B. Schwellenbach

Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Kittitas Reclamation District, et al., Plaintiffs, vs. Sunnyside Valley Irrigation District, et al., Defendants.	Civil Action No. 21

IN THE MATTER OF THE ENTRY OF A CONSENT DECREE

BE IT REMEMBERED that the above entitled and numbered cause came on for hearing in the matter of the entry of a consent decree, before the Honorable L. B. Schwellenbach, Judge of the above entitled court, sitting at Yakima, Washington, at the hour of 9:10 o'clock p.m., January 31, 1945, the parties hereto appearing as follows: Mr. Edward M. Connelly, United States Attorney for said

District, appearing for the United States of America; Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; Mr. William H. Veeder, Attorney for the Department of Justice; Mr. F. A. Kern, appearing on behalf of the Kittitas Reclamation District; Mr. Hugo F. Luhman, appearing on behalf of Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; Mr. V. O. Nichoson, appearing on behalf of Roza Irrigation District; Mr. C. P. Short, appearing on behalf of the West Side Irrigating Company and Cascade Irrigation District; Mr. John H. Lynch, appearing on behalf of Broadway Irrigation Company; Mr. Stephen E. Chaffee, appearing on behalf of Sunnyside Valley Irrigation District, Christina Mariea, Luis Luccolini and Euffemia Luccolini, his wife,

Mazine E. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Phillip Louis Parks and Ollie D. Parks, his wife, Grandview Irrigation District, Granger Irrigation District, Prosser Irrigation District, Snipes Mountain Irrigation District, Outlook Irrigation District, Yakima-Tieton Irrigation District, Tieton Water Users Association, and Zillah Irrigation District;

WHEREUPON the following proceedings were had, to-wit:

MR. CONNELLY: May it please the Court in the case of Kittitas Reclamation District, and others, vs. Sunnyside Valley Irrigation District, and others, being Civil Cause No. 21, I wish to present to the Court the motion of the United States for an order for joinder

of a new defendant. The new defendant is the Cascade Irrigation District. I am basing the motion upon the consent of the directors of that district, previously filed, to the entry of such an order, making the Cascade Irrigation District a party to this action. Later it will appear that the Cascade Irrigation District consents to the entry of a decree which includes it as a codefendant.

THE COURT: All right; I will sign this order.

MR. CONNELLY: I now wish, if your Honor please, to move the admission to practice in this court, for the purposes of this proceeding only, Assistant Attorney General William H. Veeder, of the Lands Division of the Department of Justice, at Washington,

D.C., and D. G. Tyree, Assistant Regional Counsel of the Bureau of Reclamation. They are the attorneys who with these other gentlemen have effected this settlement, and who have worked out the details, and who, if the Court wishes to ask for details concerning the provisions of the decree, would be better fortified to answer them than I would be.

THE COURT: The motion to appear in this case is granted.

MR. CONNELLY: This was read to me after it was signed. I knew what it is, Your Honor. I would like to file it, with a motion for entry of final judgment in the action referred to, and in order to show the consent of Harry Olson, and the clients whom he

represents, I would like to file this telegram, with the motion for entry of final judgment, which I now hand to the Court, with the proposed judgment attached, and this, I understand, is on the agreement that Mr. Olson will sign the formal motion when he returns to Yakima.

We have prepared a rather extended summary of this judgment, if Your Honor please, but I believe that the preliminary statement of facts to the court, and the concluding statement of the order and judgment itself, together with any information which the Court may wish to elicit from the counsel who have worked extensively and actively on it, or from Mr. Ball, would suffice, rather than the reading of this ten-page statement.

THE COURT: I want to say this, as you all recognize this is a very important piece of litigation, which has been prosecuted in a number of courts in its different aspects for a number of years. I do not anticipate that it will be possible for me to familiarize myself with all of the facts which are involved in this litigation. I do not anticipate that there will be any necessity for that. However, I do take this position in this case, as I have in every case, that I have the responsibility of knowing what I am doing when I sign my name to an order or judgment or decree. I have to understand what it is about. When counsel for the various parties get together and effect a settlement, my attitude is one of the utmost sympathy with settlement. I do not ask for an explanation with the idea of interposing

an objection to it, but for the simple reason that I believe if I sign a judgment in this case, even though it has been agreed to by all the parties, that I have the responsibility of knowing what it is about, and I want a sufficiently complete statement so I will be satisfied in my own mind I am doing what I should do.

MR. CONNELLY: I shall read all I have then. I was economizing on time.

THE COURT: Do not read it too fast.

MR. CONNELLY: I shall not, Your Honor.

* * *

The omitted colloquy consists of a verbatim reading by Mr. Connelly of the

"Statement to the Court" reproduced at pages A-77 to A-98 of this Appendix.

* * *

I would like to file that in the proceedings.

THE COURT: All right. Let us start out with this Indian business. Is that all in the Wapato Division, Mr. Veeder? I say, are all the Indian rights under that?

MR. VEEDER: Yes, sir; paragraph 4, page 15 of the judgment.

THE COURT: In this 1914 Act the 720 cubic feet of water per second is the amount Congress fixed?

MR. VEEDER: Yes, sir. I might call attention to the fact that the judgment has been reviewed by the Department of the Interior, which represents the Indian Service, and all the articles have been reviewed and approved.

THE COURT: Do you consider that you represent the point of view of the Indian Service, Mr. Tyree?

MR. TYREE: No, sir.

MR. VEEDER: The Department of Justice represents the Indian Service, and Mr. Tyree represents the Bureau of Reclamation.

THE COURT: In addition to this 720 cubic feet they have 350,000 acre feet, and the

judgment provides for 250,000 acre feet, and 100,000 acre feet.

MR. VEEDER: Yes, Your Honor. There are two contracts, one the original contract for 250,000--I beg pardon--in the contract of March 9, 1921, there are 250,000 feet, and subsequent to that a contract for 100,000 feet was entered into, making an aggregate of 350,000.

THE COURT: When it says "the agreement of March 9, 1921, as amended by the agreement of September 3, 1936", that means instead of being 250,000 feet, it was 350,000.

MR. VEEDER: No; that is the amendment in the contract. In the contract it is 250,000 acre feet, and on page 14, the final

paragraph, there is set forth a reference to the other contract which was entered into on September 3, 1936, for 100,000 acre feet.

THE COURT: That is an amendment.

MR. VEEDER: No; that is another contract.

THE COURT: There are two contracts on September 3, 1936?

MR. VEEDER: That is correct.

THE COURT: Do these contracts, in so far as they réfer to the 250,000 feet, or the 250,000, plus the 100,000 feet, recognize that the rights of the Indians were subject to the same limitations as anyone else, under the Warren Act?

MR. VEEDER: Yes, sir. There is a provision in the contract that it is subject to proration.

THE COURT: So the 1945 contract does not add any new element.

MR. VEEDER: That is right.

THE COURT: All right. Turn to page 2 of this statement. What I want to do is to go from this statement to the judgment. Where the statement says something, I want you to show me where the judgment covers it. Maybe we had better do that further along in the statement.

MR. VEEDER: Page 7.

THE COURT: "The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of Reclamation, or a watermaster, if one is appointed, may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project." Where is this watermaster provision?

MR. VEEDER: That is the final paragraph on page 30.

THE COURT: You did not feel it necessary or proper to have anything in the judgment

which would establish any procedure by which the Court could appoint a watermaster?

MR. VEEDER: That was left entirely to the discretion of the Court, on application by the interested water users.

THE COURT: Well, suppose I wake up some morning and conclude I want a watermaster.

MR. VEEDER: I think the judgment provides you could appoint one.

THE COURT: I was wondering if you should not have some provision that somebody ought to ask for it before the Court could appoint a watermaster.

MR. VEEDER: We went into rather an extended discussion at that time among the attorneys, and I think it was the consensus that if at any time it was not on the water users' desire, it would be on your own motion. The Court could appoint a water-master. The mechanics were not set up.

THE COURT: It has received full consideration?

MR. VEEDER: I think it has. That was fully discussed.

THE COURT: All right. Then start at the bottom of page 7: "There is recognized in the Sunnyside Valley Irrigation District a right to 725 cubic feet per second."

MR. VEEDER: The reference to the Sunnyside Valley Irrigation District will be found at page 28 at the top of the page, subparagraph 5.

THE COURT: Mr. Chaffee, is it in accordance with the understanding of the Sunnyside Valley Irrigation District that the estimate of the Bureau of Reclamation of 725 cubic feet per second will keep within 6% of normal?

MR. CHAFFEE: It is substantially that, if the Court please. You see, the Sunnyside Valley Irrigation District has about 77,000 acres. There will be some run-back from Roza. I might state while I am on my feet, in connection with the Sunnyside Valley Irrigation District, in reference to this

point, and the other points involved, that that judgment is very satisfactory, because it in substance recognizes all the Sunnyside Valley Irrigation District has contended for over a period of twelve years' litigation. First, it recognizes beneficial use or past use as the measure of water rights. Second, the contract entered into provides there shall be no additional construction charge, and, third, it recognizes the rights of priority that substantially protects the rights-- it is so nearly up to the full amount that it is far better for the Sunnyside Valley Irrigation District to accept it than to litigate for additional priority--and, as a matter of fact, it is all the Sunnyside Valley Irrigation District has contended for.

This litigation arose really on three different points. First, the issuance of a public notice deprived the Sunnyside Valley Irrigation District water users of 25% of their rights, and charges them with a million dollars of construction charges, and, third, refuses to recognize any priority.

Now, this judgment, in the judgment and in the contract--and, by the way, in most of these districts a contract containing the same provisions that are contained in this consent judgment, have been voted on favorably by the water users. The Tieton Water Users Association, which I represent, the vote was twenty to one in favor of the proposed settlement, and at least two or three to one in all the rest of the districts; but in substance this decree and the contract grant all the relief we asked as

to the measure of our rights in a normal year, and also no additional construction costs, and, thirdly, the full amount--or nearly, within 6 to approximately 8% in a year of water shortage, where there is a 33-1/3 shortage. And we have some other rights to waste water, and we are below the road to a certain extent, and I might say for the Sunnyside Valley Irrigation District--and I might say I am one of the proposers of this consent judgment in the first instance, and representing the Tieton Water Users Association, it is very highly satisfactory.

It was submitted to the Board of Directors and passed upon unanimously by the Trustees of the Water Users Association, and passed upon unanimously in favor of it by the Tieton Water Users at an annual meeting.

And so this proposed settlement has been carefully considered at the meetings of the Sunnyside Valley Irrigation District. There was a series of meetings held prior to the time the contract was voted on, and it was fully explained, and the Directors sent out a statement explaining the settlement, and these water users of the various districts up and down the Valley are thoroughly acquainted with it, and they are in favor of the settlement.

In my opinion, it is the most fair and equitable adjustment that could be obtained, saving expensive litigation. This will release some of the Kittitas water supply and supplement the Tieton, so the Tieton would not be the bottleneck, and receive approximately the full amount in a short-water year--the full amount that they

needed, to keep their orchards alive. That is something that could not be worked out by litigation. The small districts receive 12,000 feet additional supply. That will give them a greater base to prorate on. Some things that might have been sore spots have been ironed out in this proposed consent judgment, and it covers the situation quite completely, and in effect there is an adjudication of the water rights of the Yakima River and its tributaries.

I do not think such a thing has ever been worked out before, where there are water rights so extensive as in the Yakima River, and adjudicated by a consent judgment like this, and this is probably the last one of any consequence to be adjudicated. It seems to me it is a very happy solution of this dispute that has been extending for a long

period of years, and I think it will work out to the benefit of the Yakima Valley as a whole and the water users in the Valley.

THE COURT: At the bottom of page 27, the 250,000 cubic feet per second, Tieton?

MR. CHAFFEE: That is very satisfactory to the Tieton people, as I said.

THE COURT: Now "B", page 8, Mr. Veeder?

MR. VEEDER: This is referred to as the limiting agreement, which at the time of the institution and construction of the Yakima Project was signed by the users that had a direct flow at the time the construction was started.

This judgment leaves those rights intact, and recognizes they are subject to judicial recognition. Those limiting agreement rights were very largely covered by contracts which the water users had. In other words, when they contracted for certain storage rights, the contract also recognizes the rights they had to the direct flow from the Yakima River.

THE COURT: That is covered by the paragraph on the top of page 20?

MR. VEEDER: Yes, Your Honor.

THE COURT: Does that answer the question that I have to ask sometime? You have an agreement here between certain water users by districts. I do have to be sure you have not

taken away from people who are not parties to this action their rights in the division between the parties to the action.

MR. VEEDER: We have tried to cover that very explicitly throughout the judgment, and we have made a provision that these rights that are not covered are in no way affected. That is set forth in paragraph No. 20.

THE COURT: "The rights of any of the claimants to water of the Yakima River."

MR. VEEDER: It is on page 20.

THE COURT: That is what I am reading. "The rights of any of the claimants to water of the Yakima River or water shed who are not parties to this cause, shall in no way be

prejudiced or affected by the judgment, nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants."

I do not want to be hypertechnical, but I am wondering if the words "of the" in the next to the last line, on page 20, should not be deleted. Should it not be "the rights of any claimants to water"? In the first sentence you say: "This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River and its tributaries", and in the second paragraph: "Each of the parties to this cause, their grantees, successors and assigns, are by this judgment forever enjoined and restrained from asserting any claim to or from interfering

with the use or the delivery of those quantities of water which are recognized in this judgment."

Now, for the purpose of this analysis, leave out the first sentence, because that does not refer to it. You go on to say "the rights of any of the claimants to water". You are referring up above to claims for water. "The rights of any claimants to water of the Yakima River or water shed who are not parties to this cause."

MR. VEEDER: Striking out "of the" immediately after the word "any". I think your suggestion improves the sentence.

THE COURT: I do not want to do it unnecessarily, or if it might change the meaning of it. You are referring to claims

up above "Each of the parties to this cause are enjoined from asserting any claim". They are not claimants and they are enjoined, and you go on "The rights of any of the claimants to water who are not parties." You have the rights to any claim. You would eliminate the possibility it might refer back to the second sentence of that paragraph.

MR. VEEDER: I think that would improve it. I see no reason why it should not be done.

THE COURT: We will tentatively leave that out. "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs a, b, c and d. In a period of shortage these users must ultimately accept a

proportionate reduction based on a formula set out in the judgment." "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts." I would like to have you show me the part of the judgment supporting that statement.

MR. VEEDER: The judgment throughout recognizes the Warren Act rights by a resume in each paragraph, which contains various amounts, and those users are Warren Act users, and the quantity of water specified in each of those paragraphs is the amount of water the users are entitled to under their contract.

Now, the judgment recognizes certain preferential rights. The 725 cubic feet per second in the Sunnyside Valley Irrigation

District; the Tieton Division, 250 cubic feet per second; the Indian Service, 720 cubic feet per second. The Warren Act contractors' rights will be forced to prorate in a period of shortage, whereas under the judgment those holding the preferential rights will not be forced to prorate. The provisions for proration appear in paragraph 18, on page 26, in which it is specified these waters which will be subject to proration. In other words, all the rights that are referred to in paragraph 18 which will have to sustain a prorata diminution in case of shortage pertain to Warren Act users. The remaining ones have the preference, in accordance with the judgment.

THE COURT: All right. Now, Mr. Kern, I would like to have a statement from you. You

are furnishing the wherewithal. I want a statement in the record of the attitude of the Kittitas Reclamation District.

MR. KERN: I might say this, before there was any work in connection with trying to work out this consent decree, we had had negotiations with the Tieton Project to sell them some of our water.

The acreage in the Kittitas Reclamation District has been reduced on point classification of the land, and we would have this additional water, and we were glad to dispose of it, and then our schedule was changed. We had a very large excess of water before the first of July, and we had to use up 40% of our water by the first of July, so that we only had 60% after the first of July. We did not use the 40%, and that changed our

schedule and permitted us to use 2% 3% more after the first of July than before the first of July, and that gives us more water after the first of July, and that caused 20,000 acre feet of water to be taken from our supply before the first of July, and 10,000 after the first of July, and with that change in the schedule it left us in very good shape.

We are very well satisfied with the consent decree as drawn.

THE COURT: All right. I would like to have the record show specifically all of the signatories to the motion who are here. Moulton & Powell are not here. I would like to have the record show who are here.

THE CLERK: I have all of the attorneys who are here.

THE COURT: I would like to have the record show it, so Mr. Ridenour's record will show who is here participating in the actual presentation of this matter.

THE CLERK: I have those appearing: Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; William H. Veeder, Attorney for the Department of Justice; Edward M. Connelly, appearing for the United States of America; F. A. Kern appearing on behalf of the Kittitas Reclamation District; Hugo F. Luhman, appearing for Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; V. O. Nichoson,

appearing for Roza Irrigation; C. P. Short, appearing for West Side Irrigating Company, and Cascade Irrigation District; John H. Lynch, appearing for Broadway Irrigation Company; Stephen E. Chaffee, appearing for Sunnyside Valley Irrigation District, and a number of other parties. I have not had time to copy them off the motion.

THE COURT: Is there any one of the counsel who feels there is any matter you want to present now, any discussion you want to bring up, or any questions you want to ask?

MR. LYNCH: If Your Honor please, I represent a small company that purchased 700 acre feet of water, a private corporation, a community corporation. It is not organized

in a district. We have there a contract for the purchase of Warren Act water, and it contains general provisions for a proration of the water in short years, but the method to be pursued in making that proration is not definitely specified.

As to all those Warren Act water users, if they are all on the same plane we have no objection to being bound by the consent decree, but if it happens that some of these Warren Act users are given priority, and transferred from one section to the other, and given priorities to Warren Act water held by some other districts, or something, I would like to have that cleared up, if there is any such preference.

As I recall it, there are certain waters that were sold by the Kittitas Reclamation

District from Warren Act water, is that right?

MR. KERN: Yes.

MR. LYNCH: A portion having been released by the District, and will be apportioned to other companies or districts or users, such as the Tieton, and perhaps some on the Reservation and some others.

Is it or is it not a fact that those transfers under the Warren Act will give the advantage in prorating over the other companies or districts which have water contracts?

MR. CHAFFEE: None whatever.

MR. VEEDER: There is no preference; they are all in the same position.

THE COURT: Does anyone else want to present a question?

MR. VEEDER: What about the language at the bottom of page 29?

THE COURT: I am going to sign this, and if you gentlemen decide you want to leave it the way it is, it is all right with me, or if you decide it might be desirable to eliminate these two words, that may be done. But I will sign the judgment. I do not want to do anything which might materially change the meaning of the judgment. It just seemed to me there might be some desirability to that,

but you gentlemen can talk about it and decide what you want to do.

MR. CHAFFEE: It is okeh with me. I think it would clarify it.

MR. CONNELLY: I think it would clarify it, and I think the suggestion is a good one.

THE COURT: If it is satisfactory to everybody, I will cross out the words "of the" and make it read "The rights of any claimants to water".

I want to congratulate you gentlemen and to thank you. The possibility of trying to adjudicate these water rights for the rest of my life has been hanging over me since May, 1942, and I have had in mind that when we got through with these Hanford cases I would have

to start on this matter. I know I could appoint a master, which is all right, but a couple of times a month the lawyers would decide the master needed instructions or something, and I looked forward to a ten-year job. I did not relish it very much, but I think you gentlemen are to be congratulated. Personally, I wish to thank you.

STATE OF WASHINGTON)
COUNTY OF SPOKANE)ss.

I hereby certify that the foregoing is a true and correct transcript of the proceedings therein shown, and the whole thereof, as reported by me in shorthand at the time and place hereinbefore stated.

Dated at Spokane, Washington, this 11th day of February, 1945.

(Signed) Egan Ridenour

Official Court Reporter.

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-255 and 85-451

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUNNYSIDE VALLEY IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

UNION GAP IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, while a state water adjudication was pending in its preliminary stages, the federal district court had jurisdiction to interpret its consent decree governing distribution of water from a federal reclamation project and to give instructions to the watermaster appointed pursuant to that decree.

2. Whether the district court abused its discretion in instructing the watermaster to regulate the flow of water in the Yakima River in late 1980 and early 1981 to protect salmon eggs in the River.

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In the Supreme Court of the United States

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SUNNYSIDE VALLEY IRRIGATION DISTRICT, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-18)[1] is reported at 763 F.2d 1032. The prior opinions of the court of appeals (Pet. App. 19-36, 37-56)

[1] Unless otherwise noted, "Pet. App." refers to the separately bound appendix to the petition in No. 85-255.

are unreported. The orders of the district court (Pet. App. 57-63, 64-72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1985. The petition for a writ of certiorari in No. 85-255 was filed as of July 18, 1985, and the petition for a writ of certiorari in No. 85-451 was filed on September 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1855, the United States entered into a treaty with the Yakima Nation of Indians. Treaty of June 9, 1855, United States—Yakima Indians, 12 Stat. 951 *et seq.* (85-451 Pet. App. 76-87). See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel Ass'n*), 443 U.S. 658, 662 & n.2 (1979). By this Treaty, the Indians ceded their rights to millions of acres of territory, but reserved a tract of land, approximately one million acres in extent, to "be set apart * * * for the exclusive use and benefit of said * * * Indians, as an Indian reservation." Art. II, 12 Stat. 952. The Yakima River formed part of the boundary of the Reservation described in the Treaty. *Ibid.* Article III of the Treaty further reserved to the Indians "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation * * * [, and] also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory * * *." 12 Stat. 953. "During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were

crucial in obtaining the Indians assent." *Fishing Vessel Ass'n*, 443 U.S. at 676.

Current estimates are that, prior to the arrival of white settlers in the area, 500,000 anadromous fish entered the Yakima River annually. By the turn of the century, the fish runs had been reduced to approximately 10% of their former size, or approximately 50,000 fish. In recent years, the total Yakima River anadromous fish run has been approximately 5,000 fish per year. C.R. 230.[2]

b. This case concerns the spring Chinook salmon, which are so named because they migrate from the ocean into fresh water rivers in the spring. They do not spawn, however, until September and early October. This is the period of historic low flows in the spawning rivers, including the Yakima River. The fish select an area of gravel riverbed where the water is approximately 12 inches deep. The female digs out a depression in the gravel and lays her eggs there. After the male fertilizes the eggs, the female covers the eggs with gravel. These nests of eggs, identifiable by the disturbed gravel, are called redds. For the successful development of salmon eggs, the redds must be in an environment of flowing water. Apart from keeping the eggs moist, the flowing water serves several purposes: it supplies oxygen to the eggs; it prevents freezing of the eggs when the air temperature dips below 32° F during winter months; and it eventually provides transport for the fry in leaving the gravel and moving into the river. It is the genius of the spring Chinook to spawn at a period of low water so that, in a naturally flowing river system, the site selected for spawning will be supplied with sufficient water in the succeeding

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[2] "C.R." refers to the Clerk's Record in the court of appeals.

months to permit proper development of the eggs. See Pet. App. 7-8; 11/25/80 Tr. 102-103, 105, 118-119, 122.

The Chinook salmon have been the subject of considerable litigation in the Pacific Northwest. In 1968, individual Yakima Indians and the United States filed two suits in the United States District Court for the District of Oregon against the State of Oregon and its officials, challenging that State's regulation of Indian treaty fishing on the Columbia River. The Yakima Indian Nation and the State of Washington were granted leave to intervene in those actions. In 1977, the parties signed a conservation agreement regarding all anadromous fish, including spring Chinook, spawning above Bonneville Dam. See *United States* v. *Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981). On April 30, 1980, the State of Washington applied for an injunction to restrain Yakima Indian fishing in the Yakima and Klickitat Rivers, both on and off the Reservation. The State asserted that the 1980 spring Chinook salmon runs up the Columbia River were extremely depressed and that all fish in the River were necessary for spawning escapement in order to preserve the resource. On May 5, 1980, the district court granted the injunction, finding that all the salmon from the 1980 run of spring Chinook into the Yakima River were necessary for spawning escapement. *Id.* at 1011-1012. The court of appeals affirmed. *United States* v. *Oregon*, *supra*.

2. a. At the time of the 1855 Treaty with the Yakimas, there was no irrigated agriculture in the Yakima River watershed. As early as 1859, however, some irrigation had commenced. By the turn of the century, individual irrigators and ditch companies had appropriated the entire low water flow of the

Yakima River and its tributaries in order to irrigate lands lying largely outside the Yakima Reservation. Pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*, and enabling legislation in Washington State, Wash. Rev. Code Ann. §§ 90.40.010 *et seq.* (1962), the Reclamation Service undertook to contract storage capacity in the Yakima watershed. In the period from 1909 to 1933, the Reclamation Service built six storage reservoirs. Pet. App. 6-7.

b. In 1930, toward the end of the construction period, a dispute arose over the scope of the obligation of the Bureau of Reclamation to deliver water to holders of repayment contracts under the Yakima Project. Individual irrigators brought suit against the Secretary of the Interior in the United States District Court for the District of Columbia to establish their right to receive water in an amount they previously had beneficially used on their lands, without incurring additional repayment obligations attributable to the construction of additional storage capacity. *Ickes* v. *Fox*, 85 F.2d 294 (D.C. Cir. 1936), aff'd, 300 U.S. 82 (1937), on remand, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943).

In 1939, while *Ickes* v. *Fox* was pending, the instant suit was filed by the United States and several irrigation districts in the Yakima Project against the individuals who were the plaintiffs in *Ickes* v. *Fox*, the Sunnyside Valley Irrigation District, and other irrigation districts. *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, Civ. No. 21 (E.D. Wash.). See E.R. 1-31.[3] The complaint recited the dispute, also involved in *Ickes* v. *Fox*, concerning whether those defendants and others had the right to

[3] "E.R." refers to the Excerpts of Record filed in the court of appeals.

share in Project water according to the amount specified in their contracts or in a greater amount according to past beneficial use (E.R. 8-28). The complaint sought a declaratory judgment concerning the obligation of the United States to furnish water from the Yakima Project to irrigation users under the Project and the allocation of irrigation water among Project users (E.R. 28-29). Several of the defendants subsequently filed "cross-claims," seeking joinder of all users of Yakima River water and a general adjudication of water rights in the Yakima River and its tributaries (E.R. 53-54, 66, 79-80, 83, 105-106). However, the additional parties necessary for that purpose were never joined.

In the 1943 decision in *Ickes* v. *Fox*, *supra*, the District of Columbia Circuit held that rights to Project waters were defined by beneficial use rather than the terms of the repayment contracts. That decision eliminated the basic legal issue among the parties in the present suit and "left only the matter of the respective rights of the water users within the project undetermined" (Pet. App. 78-79). In order to avoid the need for further adjudication on the latter question, the parties entered into a consent decree (Pet. App. 139-211). That decree defined the obligation of the United States to deliver water from the Project to the United States' co-plaintiffs, to the defendants, and "to the lands within the Wapato Indian Irrigation Project" on the Yakima Reservation (*id.* at 141-142). See, *e.g.*, *id.* at 144, 169-174.

c. In the years following 1945, the Bureau of Reclamation furnished irrigation water under the terms of the decree. In 1977, however, a record drought prompted several of the parties to seek further relief from the court under its retained jurisdic-

tion to administer and interpret the decree (Pet. App. 210-211). The district court appointed William G. Gray, the Yakima Project manager, as watermaster to supervise delivery of water under the decree (*id.* at 66).

The drought also prompted renewed efforts to adjudicate water rights in the Yakima watershed. For example, the Yakima Nation of Indians sought to intervene in this proceeding in 1977, but that request was denied. The Tribe also initiated a suit in federal court to establish its rights, but that action has been stayed. *Yakima Nation* v. *United States*, Civ. No. C-77-129 (E.D. Wash.). The State of Washington similarly filed an action in state court for a general adjudication of water rights in the Yakima watershed. *State Department of Ecology* v. *Acquavella*, No. 77-2-01484-5 (Yakima County, Wash., Super. Ct.). The United States, joined as a party thereto, removed that action to federal court. However, in January 1979, the *Acquavella* case was remanded by the federal court to the state court (*Washington* v. *Acquavella*, No. C-77-347 (E.D. Wash. 1979)), where it is still pending.

3. a. In the early fall of 1980, irrigation water released from the Yakima Project reservoirs created an artificially high stream flow in portions of the Yakima River. Between the confluences of the Cle Elum and Teanaway Rivers, the stream flow was approximately 1000 cubic feet per second (c.f.s.) or higher (10/29/80 Tr. 25). In early October, the Yakima Indian Nation's tribal biologist located 60 spring Chinook redds in this stretch of the river (C.R. 23). Because of the high flows, most of the redds were located at elevations in the streambed that would be uncovered when the irrigation delivery flows were terminated (10/29/80 Tr. 25-26). If the

streamflow had been sharply reduced by closing the gates to the Cle Elum Dam, the eggs would have been destroyed. Pet. App. 59-61.

In response to these events, representatives of the Yakima Indian Nation requested the watermaster to maintain the streamflow after the irrigation season had closed in order to save the redds from destruction (10/29/80 Tr. 11-12). Conferences among the Indians, the irrigators and the United States Fish and Wildlife Service failed to achieve a solution (*ibid.*). The watermaster then approached the district court for instructions. As his counsel expressed it, the watermaster requested guidance with respect to (10/29/80 Tr. 17-18):

> how he should go ahead to implement his authority and responsibilities under the 1945 decree, his responsibility to see that the waters are diverted and allocated in accordance with that decree. * * * [I]t appears implicit in his responsibility of operating the waters or the project in accordance with the 1945 decree he would also have to give consideration as to how the carryover waters and the waters in the reservoir should be established and maintained and handled to meet what he knows will be an upcoming irrigation season.

Following a hearing, the district court ordered the watermaster to maintain a streamflow of 650 c.f.s. in the River (or a lesser amount if the redds could be protected) until November 28, 1980 (Pet. App. 62).

A further hearing was held in November 1980. That hearing explored the effect of the previous order on water storage, the prospect of the need for future water releases, and methods for enhancing the survival of the redds with less waterflow. In its

supplemental instructions, dated November 28, 1980, the district court ordered the watermaster to maintain a sufficient flow of water to protect the redds (up to 650 c.f.s.) throughout the winter; other protective measures (transplantation of some eggs and construction of berms to deflect water over other redds); and a report to the court on methods of distributing water and operating the Project to avoid similar problems in the future (Pet. App. 69-72).

b. The court of appeals affirmed the district court's orders (Pet. App. 4-18).[4] The court first held that the district court, in issuing instructions to the watermaster, had properly exercised its retained jurisdiction to interpret and administer the consent decree (*id.* at 10-12) and that the district court was not required to dismiss that ancillary proceeding in favor of *Aquavella*, the pending state water adjudication

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[4] The court of appeals' initial opinion in this case (Pet. App. 37-56) was issued on September 10, 1982. Petitioners filed for rehearing, contending that the decision below was inconsistent with the panel decision in *United States* v. *Washington (Phase II)*, 694 F.2d 1374 (9th Cir. 1982). The latter case concerned the rights of the Indians under the Treaty with the Yakimas and other treaties to a habitat for the fish that was free of degradation by the State. A petition for rehearing en banc thereafter was granted in *United States* v. *Washington, supra.* The en banc court entered a decision in that case on April 29, 1985, holding that the nature and extent of the treaty rights in this respect could not properly be addressed in a broad declaratory judgment, and must instead await a concrete controversy. See *United States* v. *Washington,* 759 F.2d 1353 (9th Cir. 1985), cert. denied, No. 85-164 (Nov. 18, 1985). The petitions for rehearing in this case had been held pending a decision on the en banc rehearing in *United States* v. *Washington, supra.* After the filing of a second set of rehearing petitions in this case, a final amended opinion (Pet. App. 4-18) was issued on June 14, 1985.

(*id.* at 13-15). The court of appeals next held that the 1945 consent decree in the instant case was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate the treaty rights of the Yakima Nation. For this reason, the court rejected petitioners' contention that the district court was barred by res judicata from taking special action to protect the fish. *Id.* at 12, 15-16.

Finally, on the merits, the court of appeals held that the district court did not abuse its discretion in issuing instructions to the watermaster in October and November 1980, in light of the emergency presented and the absence of information about alternative means of protecting the redds (*id.* at 16-17). In reaching this conclusion, the court of appeals specifically stated that it "need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty" (*id.* at 18 n.5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court below merely held that the district court did not abuse its discretion in giving instructions to the watermaster appointed to assist in the administration of a consent decree previously entered by that court. Those instructions enabled the court to address an emergency situation that threatened destruction of a substantial number of spring Chinook salmon eggs at a time when that species was so depleted that the Yakima Nation was enjoined from any harvesting. This narrow and fact-bound ruling in the administration of the consent decree does not warrant review by the Court.

1. Petitioners contend (85-255 Pet. 42-46; 85-451 Pet. 17-18) that the district court should not even have exercised jurisdiction over the controversy concerning the effect of the operation of the Yakima Project on the Chinook salmon redds in the fall of 1980. In their view, because a general adjudication of rights to the use of water in the Yakima River watershed was pending in state court, this Court's decisions in *Colorado River Water Conservation Dist.* v. *United States* (*Akin*), 424 U.S. 800 (1976), and *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), required the district court to refer the matter to the state court. This assertion is without merit.

Akin and *San Carlos Apache* involved situations in which the federal adjudication was in a preliminary stage. In this case, by contrast, the federal district court had (i) entered a consent decree in 1945 that determined the respective rights of irrigation districts, as well as lands within the Wapato Indian Irrigation Project, to receive water from the Yakima Project; (ii) retained jurisdiction to interpret and administer that decree;[5] and (iii) appointed a watermaster to assist in administration. Confronted with an emergency, the watermaster requested instructions from the court under whose authority and decree he operated. Nothing in *Akin* or *San Carlos Apache* sug-

[5] Contrary to the contention of petitioners in No. 85-255 (Pet. 38-41), because the consent decree expressly authorized the court to appoint a watermaster and to retain jurisdiction over matters relating to the "interpretation" and "administration" of the decree, the district court acted well within its authority when it issued instructions to the watermaster regarding the administration of the decree. That retained jurisdiction was not abrogated simply because the instructions specifically related to the Project's effect on the fish redds.

gests that a federal district court must decline to respond to such a request for instructions.

In addition, *Akin* and *San Carlos Apache* involved competing suits in federal and state court seeking a quantification of water rights. The dispute in this case concerned the operation of a federal reclamation project, not the quantification of water rights. Compare *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, 1135-1136 (10th Cir.), cert. denied, 444 U.S. 995 (1979) (dismissal of claim for general adjudication, but retention of jurisdiction over claim for injunction to restrain excessive diversions from water projects). The district court, in resolving this dispute, did not quantify a water right for the Yakima Indian Nation for fishery purposes. Instead, the court merely recognized that the preexisting Indian treaty fishing rights—which were confirmed by this Court in *Fishing Vessel Ass'n*—provided a relevant legal consideration in the operation of the Yakima Reclamation Project under the district court's prior consent decree.

The orders issued by the district court in 1980 also were dependent upon unique factual circumstances: first, the federal district court in Oregon had determined that all spring Chinook salmon entering the Yakima River were necessary for spawning escapement to preserve the run; and second, the jeopardy to the redds had been caused by the operation of the Yakima Project itself, because the artificially high river flows induced the salmon to spawn above the natural low flow elevation of the River. In light of these emergency conditions, the district court addressed the need for the Yakima Project to be operated to prevent destruction of the treaty-protected fish run, and it designed a remedy, through alteration

in the operation of the Project, to accomplish that end. In holding that the district court had not abused its discretion, the court of appeals expressly did not decide the scope of the Yakima Nation's treaty fishing rights (Pet. App. 18 n.5), much less the existence or extent of a reserved water right for that purpose. Its ruling therefore is entirely consistent with *Akin* and *San Carlos Apache* and implicates none of the concerns favoring deferral to state proceedings that were identified in those decisions.

2. Petitioners also contend (85-255 Pet. 32-37, 46-51; 85-451 Pet. 18-27) that the court of appeals erred in holding that the doctrine of res judicata, as applied to the 1945 consent decree, did not bar the district court from considering the effect of the operation of the Yakima Project on the spring Chinook salmon. In petitioners' view, this holding is contrary to the decision in *Nevada* v. *United States*, 463 U.S. 110 (1983). Petitioners concede (85-255 Pet. 48; 85-451 Pet. 24) that the litigation that led to the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin; but they nevertheless seek to bind the United States and the Yakima Indian Nation as if it were such a general adjudication. As we explain below, petitioners' characterization of the litigation below is incorrect, and the court of appeals' decision is fully consistent with *Nevada* v. *United States*, *supra*.

In *Nevada* v. *United States*, *supra*, the United States and the Pyramid Lake Paiute Tribe instituted an action to establish rights to water from the Truckee River to benefit the fish in Pyramid Lake on the Pyramid Lake Indian Reservation. This Court held that under the doctrine of res judicata, the consent decree in a previous case, *United States* v. *Orr*

Water Ditch Co., Equity No. 3 (D. Nev.), barred the assertion of further reserved rights to Truckee River water on behalf of the Tribe. 463 U.S. at 145. The *Orr Ditch* litigation had been commenced in 1913 to quiet the title of all claimants to water from the Truckee River watershed, including the Indians of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project. Consistent with this broad scope of *Orr Ditch*, the United States brought that action both on its own behalf and on behalf of the Reservation Indians. 463 U.S. 116, 118, 135, 138, 140. In finding the government's subsequent action barred by res judicata, the Court specifically stated that the purpose of the *Orr Ditch* litigation and decree was to settle the rights of all claimants to water from the Truckee River (463 U.S. at at 131-133) and that the government had been given a fair opportunity—and had taken that opportunity—to litigate the Reservation's entire right to such water (*ibid.*). In those circumstances, the Court held that the government's attempt to claim additional rights on behalf of the Tribe presented the same cause of action as the government had asserted in *Orr Ditch*. Relitigation therefore was barred under the doctrine of res judicata. 463 U.S. at 130-144.

The circumstances leading to the 1945 consent decree in the instant case were quite different from those involved in *Orr Ditch*. This case was initiated to determine the obligations of the United States in the distribution of water from the Yakima Reclamation Project to water users who held repayment contracts and the respective rights under the Project of the irrigation districts and the lands within the Wapato Indian Irrigation Project. It was not commenced to determine the rights of the Yakima Reclamation

Project as a whole as against all other claimants to the waters of the Yakima watershed.[6]

Consistent with this limited purpose, the original complaint named as parties only those entities and individuals who held contracts for water service from the Yakima Project (E.R. 14.), and the principal relief requested was a declaration whether the obligation of the United States to deliver Yakima Project water was defined by the amounts of water specified in individual contracts or by some other principle (such as past beneficial use). E.R. 28-29.[7] If a prin-

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[6] In contrast to the case of the Newlands Reclamation Project and the Truckee River, the government did not initiate a suit to quiet title to the waters of the Yakima River in connection with its commencement of the Yakima Reclamation Project. Instead, many then-existing water users executed limiting agreements, and the Secretary of the Interior limited the Yakima Indians' claim to the low-water flow of the Yakima River mainstem to 147 c.f.s. Congress subsequently repudiated the 147 c.f.s. limitation and ordered the Bureau of Reclamation to provide at least 720 c.f.s. to the lands of the Yakima Indian Reservation. Act of Aug. 1, 1914, ch. 222, § 22, 38 Stat. 604. A similar limiting agreement concerning the Indians' rights to waters in Ahtanum Creek, a boundary water of the Yakima Reservation, was construed by the Ninth Circuit in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (1956), cert. denied, 352 U.S. 988 (1957), after remand, 330 F.2d 897 (1964). The Ninth Circuit there concluded that the agreement was a recognition of the non-Indians' subordinate water rights during the historic irrigation season and that the Indians' reserved rights to water from Ahtanum Creek were unimpaired at all other times. 330 F.2d at 915.

[7] The dispute underlying this litigation arose because the Reclamation Service had, in the years preceding 1930, delivered water to some lands served by the Project in excess of the amounts specified in the repayment contracts. In the early 1930's, the Secretary of the Interior attempted to require

ciple of limitation other than one based on the amounts specified in the contracts was to be chosen, the complaint requested a declaration concerning how water was to be allocated among the competing water users—in view of the practical reality that there might not be enough water available for the Project as a whole to satisfy that greater demand. It was only in this sense that the complaint requested a declaration of the rights among the parties (*id.* at 29).[8]

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those users to sign additional contracts for the excess water. Individual water users filed suit—first in the Eastern District of Washington (*Moore* v. *Anderson*, 68 F.2d 191 (9th Cir. 1933), cert. denied, 293 U.S. 567 (1934)), and then in the District of Columbia. *Ickes* v. *Fox*, *supra*.

[8] The petitioners in No. 85-255 rely (Pet. 49) on a selective quotation from Paragraph 18 of the United States' complaint for the proposition that the United States intended to put in issue all of the water rights in the Yakima Basin, including those of the Yakima Nation. Petitioners quote the portion of Paragraph 18 that states that "the * * * water rights of *said plaintiffs* and all of the defendants herein and of all of the parties having rights to receive water from the Yakima Project are * * * inter-related and inter-dependent" (E.R. 15 (emphasis added)). Petitioners fail to quote the opening sentence of Paragraph 18, which states: "All of defendants herein and plaintiffs *other than the United States* have contracts with the United States for specified amounts or proportionate shares of the water supply made available by the * * * Yakima Project, and *said plaintiffs* and all of defendants are dependent in whole or in part" on works constructed by the United States in connection with the Yakima Project (E.R. 14 (emphasis added)). The "said plaintiffs" in the sentence quoted by petitioners therefore obviously refers to the plaintiffs *other than* the United States who have contracts *with* the United States for the delivery of water from the Yakima Project. For this reason, Paragraph 18 plainly does not embrace any rights of the United States outside of the context of the Yakima Project.

The consent decree entered in 1945 effectuated the purpose of the complaint filed by the United States. The decree sets out schedules of the amounts of water to be delivered from the Project to each irrigation district and the lands of the Wapato Indian Irrigation Project[9] on a monthly basis during the irrigation season (Paras. 3-16, *reprinted at* Pet. App. 142-200), provides for an allocation system in times of shortage (Paras. 18, 19, *reprinted at* Pet. App. 201-209), and states that the "rights of any claimants to water of the Yakima River who are not parties to this cause shall in no way be prejudiced or affected by this judgment" (Para. 20, *reprinted at* Pet. App. 210). In sum, the litigation, as designed and concluded, settled only the rights among the users of Yakima Project water and the obligations of the United States to deliver the water available to the Yakima Project. The decree therefore was res judicata only with respect to those competing demands of irrigation districts and others to waters of the Yakima Project (compare *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U.S. 371 (1910), upon which petitioners rely (85-255 Pet. 48; 85-451 Pet. 25)), not with respect to the aggregate rights of the Project as against all other users of Yakima River water, including any requirements for fishery purposes.

In contrast to *Orr Ditch*, then, the United States did not intend in the *Kittitas* litigation to take advantage of an opportunity to litigate the rights of the Yakima Indian Nation to water from the Yakima

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[9] The Wapato Indian Irrigation Project is operated by the Bureau of Indian Affairs and serves allotted lands within the Yakima Reservation. References to "Indian rights" cited by petitioner Sunnyside (85-255 Pet. 36) refer to this BIA project and not to the Yakima Indian Nation.

River. When the cross-claims were filed asking for joinder of additional parties and a general adjudication, the United States filed a motion to dismiss. Had *Kittitas* been expanded into a general adjudication, the Indians' *Winters* rights—as well as all reserved rights claimed by any other agency of the United States—presumably would have been put in issue. But the additional parties necessary to such a general adjudication were never joined, and that broad adjudication was never accomplished.[10]

In any event, the issue in this case is whether the 1945 decree was intended to require the operation of the Yakima Project in a way that destroyed fish life. At the very least, the decree was not intended to have that drastic result. This much is clear from Paragraph 17 of the decree. That paragraph provides for distribution to the irrigator parties of flood water in

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[10] This context is confirmed by a letter discussed in the government's response to petitioners' petition for rehearing in the court of appeals. In recommending dismissal of the cross-claims, government counsel noted the radical and burdensome expansion of the suit threatened by the cross-complaint:

> "The cross-complaint threatens a general adjudication which we definitely do not want and definitely is not within the scope of the complaint. We think that we can now with justification ask for the dismissal of this case without prejudice on the grounds * * * that it is wholly unnecessary, will subject the water users to unwarranted expense and is not the purpose of our original action. We might also consider pointing out to the court that if this action should result in a general adjudication of the Yakima, the Indians' rights under the Winter's doctrine would also be involved."

Response of U.S. to Renewed Petitions for Rehearing with Sugestion of En Banc Consideration 8, quoting letter from District Counsel to Commissioner, Bureau of Reclamation at 4 (Nov. 28, 1941).

excess of the amount to which those parties are entitled under the decree. Flood water is deemed to be available for this purpose when the Yakima Project supervisor determines that "there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for *proper river regulation, including in said amount the amount necessary to protect fish life in the river below said dam*" (Pet. App. 200-201 (emphasis added)). The emphasized phrase manifests an intent to "protect fish life," and indeed deems that purpose an aspect of "proper river regulation." That is the principle recognized and applied by the district court and court of appeals.

We note as well that petitioners do not contend that the regulation of the Project and the River in late 1980 and early 1981, pursuant to the two instructions to the watermaster, affected the amount of water stored upstream to such an extent that the amount of water actually received by irrigators in 1981 was reduced below that to which they were entitled under the 1945 decree. If the irrigators' requirements were met, they have no cause to complain about the manner in which the Project was operated. Thus, unlike in *Nevada* v. *United States*, *supra*, where the United States and the Tribe asserted an actual reserved right to a quantity of Truckee River water that necessarily would have been recognized at the expense of irrigation uses, the operation of the Yakima Project in a manner that prevents destruction of treaty-protected fish does not necessarily infringe upon or conflict with irrigation uses.

Finally, as we have explained, the nature and extent of the Yakima Nation's fishing rights under the 1855 Treaty, as against other activities that affect the River, were not determined in this case (see Pet.

App. 18 n.5). The Ninth Circuit's recent decision in *United States* v. *Washington*, *supra* (discussed at note 4, *supra*), in fact makes clear that the court of appeals will proceed cautiously and on a case-by-case basis in exploring that issue. Nor does the court of appeals' decision recognize a reserved water right, as such, for the benefit of treaty-protected fishing rights. Cf. Pet. App. 48, 55 n.5. The adjudication and quantification of any such water right, along with all rights to water in the Yakima River Basin, will occur in the *Acquavella* litigation, which is pending in state court. Only when that litigation is completed will the respective rights of all concerned be known. There accordingly is no occasion for review by this Court of the resolution by the courts below of the episode concerning the Chinook salmon redds that occurred five years ago.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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